No. 87-283-CFX
Status: GRANTED

Title: Joseph G. Budinich, Petitioner
v.
Becton Dickinson and Company

Docketed:
July 14, 1987

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Frank,Thomas E.

Counsel for respondent: Kahn,Edwin S., Rushton,Terre Lee

NOTE* Time to file ext to & inc. 7.14.87 by White, J., cited

Entry	Date	Note	Proceedings and Orders
1	Jun 24 1987		Application for extension of time to file petition and order granting same until July 14, 1987 (White, June 25, 1987).
2	Jul 14 1987	G	Petition for writ of certiorari filed.
3	Sep 10 1987		Brief of respondent Becton Dickinson and Co. in opposition filed.
4	Sep 16 1987		DISTRIBUTED. October 9, 1987
5	Oct 13 1987		Petition GRANTED.
			**********
6	Nov 27 1987		Joint appendix filed.
8	Nov 30 1987		Order extending time to file brief of petitioner on the merits until December 11, 1987.
9	Dec 11 1987		Brief of petitioner Joseph G. Budinich filed.
11	Dec 18 1987		Record filed.
		*	Certified original record and C.A. proceedings, 5 volumes, received.
13	Jan 6 1988		Order extending time to file brief of respondent on the merits until January 28, 1988.
14	Jan 28 1988		Brief of respondent Becton Dickinson and Co. filed.
17	Feb 5 1988		SET FOR ARGUMENT, Monday, March 21, 1988. (3rd case).
15	Feb 8 1988		CIRCULATED.
18	Mar 10 1988	D	Motion of petitioner to direct the Clerk to file reply brief out-of-time filed.
19	Mar 15 1988		DISTRIBUTED March 18, 1988. (Above motion).
20	Mar 21 1988		Motion of petitioner to direct the Clerk to file reply brief out-of-time DENIED.
21	Mar 21 1988		ARGUED.

87-283

Case No. _____

Supreme Court, U.S.
FILED
JUL 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER TERM 1987

JOSEPH G. BUDINICH,

Petitioner,

vs.

BECTON DICKINSON AND COMPANY,
a foreign corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.
Case No. 84-2192

FRANK & FINGER, P.C.

By: Thomas E. Frank
Attorney for Petitioner
P.O. Box 1477
Evergreen, CO 80439
(303) 674-6955

I

PETITION

Joseph G. Budinich, by and through his undersigned attorney, pursuant to 28 U.S.C. §1254, hereby petitions the United States Supreme Court to review by Writ of Certiorari the decision of the United States Court of Appeals, Tenth Circuit, Case No. 84-2192 entitled Budinich vs. Becton Dickinson and Company, a foreign corporation. Pursuant to Rule 21 of the United States Supreme Court, the Petitioner would show the Court as follows:

A. QUESTION PRESENTED FOR REVIEW

The question presented to the Supreme Court is whether the Court's holding in White v. New Hampshire, 455 U.S. 445 (1982), that an award of attorney's fees under a federal statute is an ancillary part of the proceeding, applies to diversity action cases where state law, like Colorado's, provides that attorney's fees are a substantive part of the relief; or whether State substantive law is controlling because of the principles announced in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

If State substantive law controls, then the Court of Appeals' determination that it lacked jurisdiction to hear the appeal on the merits is erroneous. On the other hand, if White v. New Hampshire is controlling, the Petitioner argues that the decision is new law relating to diversity cases and that it should only be given prospective application.

B. PARTIES INVOLVED

The parties involved in the proceeding below are:

I. Joseph Budinich, Appellant
II. Becton Dickinson and Company, Appellee

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D. REFERENCE TO OFFICIAL REPORTS

The decision of the Tenth Circuit is published at 807 F.2d 155 (10th Cir., 1986).

E. JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The time requirements of 28 U.S.C. §2101 have been met, pursuant to the extension of time permitted by Rule 20 and the order of the Honorable Justice Byron White dated June 25, 1987.

1. The date of judgment or decision that is sought to be reviewed was December 12, 1986.

2. Denial of Petitioner's Motion For Reconsideration occurred on March 26, 1987.

Petitioner's Application For Extension of Time to file Petition for Writ of Certiorari was granted on June 24, 1987 permitting an extension by and through July 14, 1987.

3. No cross petition for Writ of Certiorari was filed.

4. Jurisdiction is supported under Rule 17.1(a) and 17.1(c) in that the instant decision involves an important question of federal law which should be settled by this Court; and the decision of the 10th Circuit is in conflict with other Circuit decisions which are detailed in Section G of this Petition.

F. CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 10. POWERS RESERVED TO THE STATES OR PEOPLE.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

ARTICLE IV, SECTION 1. FULL FAITH AND CREDIT.

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

ARTICLE VI. CLAUSE 2 — SUPREME LAW.

"The Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound, thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding."

G. STATEMENT OF THE CASE

This matter centers on a dispute between the parties relating to commissions on the sale of certain vapor sensing equipment sold to the United States Air Force. The action was originally filed in the District Court in and for the City and County of Denver, State of Colorado. The Defendant, Becton Dickinson removed the action based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.

After the close of discovery, the Defendant, Becton Dickinson moved for summary judgment arguing that a company could change its commissions schedule at any time and the change was binding on its employees.

Plaintiff argued that the law of the State of Colorado required the company to honor the commission terms for all orders received or orders in process and that the change was only valid prospectively. Plaintiff's argument was rejected by the United States District Court in regard to certain claims despite being supported by Colorado case law.[1] Certain claims were not dismissed, including a claim of fraud and second commission claim. The

1. Colorado case law supporting Plaintiff's position on commissions due include Hofer v. Polly Little Realtors, Inc., 534 P.2d 114 (Colo. App., 1975) and Brogan v. Bill Eager Motors, Inc., 561 P.2d 377 (Colo. App., 1977).

remaining claims were tried to a jury. The jury was unable to render a verdict and a mistrial was declared. Plaintiff moved for reinstatement of the claims summarily adjudged and this motion was denied. A second trial was held which resulted in a Plaintiff's verdict for the second commission claim and a defense verdict for the fraud claim.

Plaintiff filed a Motion for Attorney Fees since commission claims are claims for wages and Colorado mandates that attorney fees be included as part of the remedy. Additionally, Plaintiff moved for new trial or amendment of judgment alleging multiple errors both at trial and in deciding pretrial motions, including the Motion for Summary Judgment.

The Court in a single order granted an award of attorney fees finding that such fees are not discretionary and must under Colorado law be included in the judgment as part of the relief, but left open the issue of the amount due; and denied the Motion for new trial or amendment of judgment. Plaintiff was ordered to submit detailed records and explanations to justify the attorney fee request while the motion was held in abeyance. This was accomplished in a supplemental filing.

The Court thereafter entered a supplemental order awarding attorney fees.

Plaintiff filed an appeal in what he believed to be a timely fashion because the amount of the fees related back to what the trial court had found to be part of the mandatory relief under Colorado law. This finding was made in the trial court's order dated May 14, 1984 and appearing in the Appendix as item II-C.

Immediately after the appeal was filed the Defendant moved for summary disposition of the case on jurisdictional grounds relying on White, supra.

The Court of Appeals required the respective parties to brief the jurisdictional issues before submitting briefs on the merits.

On December 12, 1986 the Tenth Circuit Court of Appeals ruled that it lacked jurisdiction to hear the appeal on the merits. The Court of Appeals' decision that it lacked jurisdiction was based on the application of White, supra. The Circuit Court found a need for a uniform and unqualified rule. In so ruling, the Tenth Circuit found that Colorado substantive law as determined by Colorado Appellate Courts was irrelevant to its determination.

Colorado's substantive law is that an attorney fee award, particularly under its wage claim statute, is not ancillary to the underlying proceeding, but is an inherent part of the claim. Ortega v. Board of County Commissioners, 657 P.2d 989 (Colo. App. 1982) cert denied; Ball Corporation v. Loran, 42 Colo. App. 401, 496 P.2d 412 (Colo. App. 1979); Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), cert. denied 105 S.Ct. 2024 (1985).

The Tenth Circuit's interpretation of White, supra, to Plaintiff's knowledge, is the broadest application of that decision yet made. The decision appears to conflict with two other Circuits' approach. The Fifth Circuit and Eleventh Circuit have both expressed the need to make a threshold determination whether attorneys fees are recognized as an inherent part of the relief. See Fort v. Roadway Express, Inc., 746 F.2d 744 (11th Cir., 1984) and Rodriguez v. Handy, 802 F.2d 817 (5th Cir., 1986). Once this determination is reached, the courts will determine if White, supra is applicable.

While Plaintiff agrees that a uniform rule is needed relating to attorney fee application, Plaintiff believes that the rule established by the Tenth Circuit is erroneous and is contrary to the Constitutional reservation of powers to the State.

The power of States to govern their internal affairs and to enact their own substantive laws is firmly and unquestionably guaranteed by the Tenth Amendment to the United States Constitution. The laws of Colorado, albeit legislatively enacted or judicially determined, are entitled to Full Faith and Credit pursuant to Article IV, Section 1, not only by other States but also by the federal system, including Federal Courts.

Colorado's substantive law cannot be as easily dismissed as has been done by the Tenth Circuit. The determination of whether attorney's fees are an inherent part of the claim is a "substantive determination." Once made, procedural ramifications come to bear. See, Hanna v. Plumber, 380 U.S. 460 (1965).

A difference of substantive determination by this Court as to attorney fees granted under federal statute and by the Colorado Courts relating to attorney fees under Colorado statute is not offensive to the federal system of government. Each decision is entitled to full faith and credit in its own right. Neither decision is right or wrong, nor is there an actual conflict. There is only a perceived conflict because the two systems have reached different conclusions. But under our Constitutional system, each entity is entitled to establish their own substantive laws and have those laws applied.

Reconciliation of the perceived conflict is, however, possible. The uniform rule that the Tenth Circuit searches for is one that holds where the underlying claim is based on Federal Statute, the application for attorney fees is ancillary. Whereas, if the underlying claim is based on State law, the

substantive law of the State forum controls. Adopting this rule preserves both the integrity of White, supra and the Constitutional mandate of the Tenth Amendment and the Full Faith and Credit Clause the the United States Constitution.

H. REASONS FOR ALLOWANCE OF THE WRIT

Granting the petition in this matter will allow the Court to elaborate on its holding in White v. New Hampshire, supra. The Court will clarify whether White, supra applies to diversity jurisdiction cases where State substantive law is or may be that attorney fees are part of the statutory remedy. An examination of this question is essential based on the Tenth Amendment and the Full Faith and Credit clause of the United States Constitution. Rule 17.1(c) is applicable.

Additionally, there is conflict in the Circuits as to how White, supra. should be applied in other than Section 1988 attorney fee claims. This makes applicable the provision of 17.1(a).

Lastly, litigants in the Federal Court are entitled to have a clear, concise and comprehensive rule to follow. No such rule will exist until this Court announces the substantive law. The Circuit Courts will continue making ad hoc decisions which may or may not be in conformity with the Constitution.

I. APPENDIX

The Appendix containing the required information is attached.

Respectfully submitted,
FRANK & FINGER, P.C.

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III

APPENDIX

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APPENDIX I.A

PER CURIAM OPINION ENTERED DECEMBER 12, 1986
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

BECTON DICKINSON AND COMPANY, a foreign corporation,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 82-F-462)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

William S. Finger of Nicholls, Kusic, Frank & Finger, Evergreen, Colorado, for Plaintiff-Appellant.

Terre Lee Rushton of Kelly, Haglund, Garnsey & Kahn, Denver, Colorado, for Defendant-Appellee.

Before McKAY, SETH, and TACHA, Circuit Judges.

PER CURIAM.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This action arises out of an employment contract under which plaintiff served as defendant's western regional manager for a salary plus commission on sales. Prior to plaintiff's completion of a major sale to the United States Air Force, defendant's commission structure was modified, resulting in a substantial reduction in the commission ultimately paid to plaintiff. Although he protested, plaintiff continued his employment with defendant. Sometime later, and shortly before an order for spare parts and a supplemental purchase order were placed by the Air Force, defendant terminated plaintiff's employment.

Plaintiff initially brought this diversity action asserting claims for breach of contract, quantum meruit, misrepresentation, and outrageous conduct. Following a lengthy procedural course, during which plaintiff's claims were revised somewhat as a result of the district court's grant of partial summary judgment for defendant, the case was tried to a jury, which found for defendant on plaintiff's misrepresentation and implied contract (for commission on the spare parts order) claims but awarded plaintiff $5,000 on an implied contract theory regarding the supplemental purchase order.

The district court entered judgment on the verdict on March 26, 1984. Plaintiff timely filed an original and an amended new trial motion challenging various substantive rulings by the district court, as well as a motion for attorney's fees. On May 16, 1984, the new trial motions were disposed of, but the district court reserved determination of the amount of attorney's fees to be awarded to plaintiff. The district court ultimately issued its final order regarding the fees issue on August 2, 1984, and plaintiff filed his sole notice of appeal from the court's post-trial orders on August 29, 1984.

Defendant has moved for summary dismissal of this appeal as untimely, relying on the principle we first announced in Cox v. Flood, 683 F.2d 330 (10th Cir. 1982). In Cox and several later cases, this court held that judgments finally disposing of the merits are appealable even though

questions relating to attorney's fees have been left undecided. Id. at 331; see, e.g., Art Janpol Volkswagen v. Fiat Motors, 767 F.2d 690 (10th Cir. 1985); cf. Dataq, Inc. v. Tokheim Corp., 736 F.2d 601 (10th Cir. 1984). Accordingly, an appeal on the merits must be filed within the requisite time period following entry of final judgment thereon, notwithstanding that a motion for attorney's fees may be pending. See West v. Keve, 721 F.2d 91 (3d Cir. 1983); Smillie v. Park Chemical Co., 710 F.2d 271 (6th Cir. 1983). Since plaintiff did not file a notice of appeal from the district court's May 16, 1984, order disposing of his new trial motions until August 29, 1984, when he appealed the district court's award of $1,000 in attorney's fees, defendant contends that the former appeal must be dismissed as untimely.

Plaintiff seeks to avoid the effect of the authorities cited by arguing that, unlike our previous decisions, the present case involves a situation where attorney's fees are an inherent part of the relief sought and, consequently, must be determined before the judgment on the merits can be considered final. While there is some authority for the type of suitational approach advocated by plaintiff, see F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563 (2d Cir. 1985); McQurter v. Atlanta, 724 F.2d 881 (11th Cir. 1984); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), cert. denied, 459 U.S. 1107 (1983), we believe the better course is followed in those circuits which treat all attorney's fees motions as procedural equivalents and uniformly require separate notices of appeal when such motions are resolved after judgment has been rendered on the merits. See Exchange National Bank v. Daniels, 763 F.2d 286 (7th Cir. 1985); Morgan v. Union Metal Manufacturing, 757 F.2d 792 (6th Cir. 1985); International Association of Bridge, etc., Local Union 75 v. Madison Industries, Inc., 733 F.2d 656 (9th Cir. 1984); West v. Keve, supra.

A uniform, unqualified rule is especially appropriate in the present context for several reasons. First, the de facto, case-by-case analysis required by the situational approach, and the consequent uncertainty it would promote until an inclusive and coherent set of principles could be worked out,

is particularly unsuited to a jurisdictional rule that requires forfeiture of an appeal for noncompliance. See Daniels, supra at 293; 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3915 at 398-401 (Supp. 1985); see also Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 n.4 (5th Cir. 1984) (Fifth Circuit acknowledging the difficulties its situational approach may cause litigants). Second, to be consistent, those courts holding that under particular cirumstances fees are an integral part of the judgment, which is therefore not final until the matter of fees is resolved, must also hold that motions relating to such fees are, in effect, motions to alter or amend judgment and thus subject to the time constraints of Fed. R. Civ. P. 59(e). This result, however, cannot be endorsed in light of the Supreme Court's analysis and decision in White v. New Hampshire, 455 U.S. 445 (1982) (holding Rule 59(e) inapplicable to requests for fees under 42 U.S.C. § 1988). Of course, the White holding specifically applies only to § 1988 requests, but nothing in the opinion indicates that motions seeking fees pursuant to other authority should be treated any differently. See id. at 450-55. Third, divining the degree of relationship between attorney's fees and the compensation sought in any particular case is a procedure of uncertain design and questionable validity. The Third Circuit has expressed this concern in more specific terms:

> We reject as altogether too metaphysical the distinction between fees that are "compensation for injury" and those that are not. All awards of fees make the prevailing party better off. Whether this benefit is "really" a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely and leaving the prevailing party with a greater net award, is a question of semantics rather than substance. Resolution of this question would depend on the legislative (or bargaining) history of a given statute or contract — if indeed such a question ever has a sensible answer.

Daniels, supra at 294. Finally, we note that the adoption of a per se rather than situational approach is certainly consistent with, if not compelled by, this

court's unqualified holdings in prior decisions. See, e.g., Cox, supra at 331 (''judgments finally disposing of the merits are appealable even though questions relating to attorney's fees have been left undecided''); Clulow v. Oklahoma, 700 F.2d 1291, 1293 n.1 (10th Cir. 1983) (''outstanding motions for fee awards are no longer to be considered as affecting the finality and appealability of decisions on the merits'').

Plaintiff also argues that, since this is a diversity action, the rule of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), precludes the application of the principles developed by this court in Cox and subsequent cases. In plaintiff's view, the law of Colorado, the forum state, which apparently would permit joint appeal of the merits and attorney's fees determinations under the present circumstances, see Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), cert. denied, 105 S. Ct. 2024 (1985), must be applied. We disagree. State law governs only those issues that are properly characterized as substantive; matters of procedure are controlled by federal law. Hanna v. Plumer, 380 U.S. 460 (1965); Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982). The specification of the time for filing a notice of appeal from the judgment of a federal district court is clearly a question of federal procedure and as such is governed by federal law. See generally Art Janpol Volkswagen, supra, and Daniels, supra (both cases applying federal law to the issue presently under consideration, without acknowledgment of any Erie problem). Diversity cases decided by courts following the situational approach, such as Certain British Underwriters v. Jet Charter Service, Inc., 739 F.2d 534, 535-36 (11th Cir. 1984) and Oxford Production Credit Association v. Duckworth, 689 F.2d 587, 588-89 (5th Cir. 1982), which hold the underlying determination of the relationship of fees to the merits to be a matter of state law, are not necessarily inconsistent with the result reached here. Indeed, these decisions do apply federal law — i.e., the situational approach developed by the particular circuit — to the ultimate issue of appellate jurisdiction.

For the reasons discussed above, we hold that the principle first

enunciated in Cox applies in diversity as well as federal question cases regardless of the perceived relationship between the fee award and the determination of the underlying controversy. Furthermore, we find plaintiff's plea for nonretroactive application of our decision to be entirely out of place. While this court has not yet expressly ruled on the issues raised by plaintiff's proposed exception to Cox, not one of our post-Cox decisions even suggests that the situational approach advocated by plaintiff might be adopted or that diversity cases would somehow warrant special treatment. We are neither overruling clear past precedent nor deciding an issue of first impression whose resolution was not clearly foreshadowed. See EEOC v. Gaddis, 733 F.2d 1373, 1376 (10th Cir. 1984). If nonretroactivity were required under these circumstances, virtually every appellant with enough intellectual ingenuity to state his position in terms of an as yet unconsidered exception to an existing rule would be able to side-step the ''new principle of law'' hurdle imposed in Gaddis.

Accordingly, plaintiff's attempted appeal from the district court's judgment on the merits must be dismissed. The notice of appeal, filed more than thirty days after the denial of plaintiff's motions for new trial, was untimely and ineffective. Fed. R. App. P. 4(a) (1) and (4).

Defendant has also moved to dismiss this appeal as it relates to the district court's order of August 2, 1984, which finally resolved the issue of attorney's fees. Defendant contends that plaintiff's notice of appeal, filed after said order but before the fees were taxed as costs in accordance with the court's direction, was premature. This argument is without merit. The taxation of costs is a ministerial function, and, as such, its completion is not a prerequisite to the finality of the district court's underlying order regarding fees. See United States v. 2, 186.63 Acres of Land, 464 F.2d 676, 678 (10th Cir. 1972).

Without a single reference to any supporting authority, plaintiff asserts that the district court's award of fees is contrary to existing standards and inadequately vague. We cannot agree. Indeed, in light of the thorough

analysis evident in the district court's orders addressing the matter, and the unsupported, perfunctory objections raised by plaintiff on appeal, very little need be said about the fee award. The determination of a reasonable fee under Colo. Rev. Stat. § 8-4-114 is a question of fact for the trial court and should not be disturbed on review unless patently erroneous and unsupported by the evidence. Hartman v. Freedman, 591 P.2d 1318, 1322 (Colo. 1979). Plaintiff has failed to demonstrate such error here.

The motion for summary disposition is GRANTED and the appeal DISMISSED as to all issues except the award of attorney's fees. The judgment of the United States District Court for the District of Colorado awarding attorney's fees to plaintiff in the amount of $1,000 is AFFIRMED. Plaintiff's request for additional briefing is inappropriate and, in light of the disposition of this appeal, moot. The mandate shall issue forthwith.

APPENDIX I.B

DENIAL OF MOTION FOR RECONSIDERATION REVIEWED AS A MOTION FOR RECALL ENTERED MARCH 26, 1987 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JANUARY TERM — March 26, 1987

Before Honorable Monroe G. McKay, Honorable Oliver Seth, and Honorable Deanell Reece Tacha, Circuit Judges, United States Court of Appeals

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

BECTON DICKINSON AND COMPANY, a foreign corporation,

Defendant-Appellee

No. 84-2192

This matter comes on for consideration of plaintiff's petition for rehearing, which we construe as a motion to recall the mandate.

Upon consideration thereof, the motion is denied.

/ signed /

ROBERT L. HOECKER, Clerk

APPENDIX II.A

ORDER OF MAY 31, 1983 GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ENTRED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Chief Judge Sherman G. Finesilver:

THIS MATTER is before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. Plaintiff seeks summary judgment only as to his First Claim for Relief while Defendant seeks summary judgment on all claims in Plaintiff's Complaint. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332, diversity of citizenship.

The parties have been given the opportunity to thoroughly brief all issues presented by the two motions. Upon careful consideration of those briefs, the evidence presented, and the applicable law, we are of the view that Plaintiff's Motion for Partial Summary Judgment should be DENIED and that Defendant's Motion for Summary Judgment should be GRANTED IN PART and DENIED IN PART. Because of the imminence of the trial in this case, and therefore the necessity for a speedy resolution of these motions, the Court will not set forth a detailed review of either the facts or the law which

support this Order. The Court reserves the right to do so at a later date.

The disputes in this case arise out of the parties' employment relationship. Plaintiff was employed by Defendant in either late 1978 or early 1979 as the Western Regional Sales Manager for Defendant. He was employed in that capacity until his termination on November 30, 1981. Part of Plaintiff's compensation as a regional sales manager was a commission on sales of Defendant's products within his region. Prior to October 1979, Defendant utilized a commission schedule which paid 2% on total net sales from base to quota and 4% on total net sales exceeding annual quota. Defendant modified its commission schedule at its quarterly national sales meeting in October, 1979. The revised commission schedule provided for a $10,000 ceiling on a commission earned on any one sale.

The immediate controversy arose with the completion of a large contract with the United States Air Force for the purchase of 157 portable vapor dectors (''PVD's'') manufactured by Defendant. With the signing of the definitive award/contract on August 6, 1981, Plaintiff was paid a commission on the sale of $10,000. On November 3, 1981, Plaintiff wrote a letter to Defendant demanding payment of a commission pursuant to the original commission schedule in effect prior to October, 1979. Plaintiff was terminated on November 30, 1981. Subsequent to his termination, Defendant entered into a separate contract with the Air Force for the purchase of an additional 77 PVD's and modified the original contract to include spare parts and accessories. Plaintiff brought this suit for breach of his employment contract, quantum meruit, false representation, wrongful discharge, and outrageous conduct. Plaintiff seeks additional compensation on the August 6, 1981 contract pursuant to the original commission schedule and the payment of a commission on both the subsequent contract with the Air Force and the modification of the first contract.

Summary judgment is appropriate only where the pleadings, affidavits, depositions, admissions, or other evidence submitted demonstrate that there are no genuine issues of material fact and that the moving party is

entitled to judgment as a matter of law. See eg. Cayce v. Carter Oil Company, 618 F.2d 669 (10th Cir. 1980); Webbe v. McGhie Land Title Company, 549 F.2d 1358 (10th Cir. 1977); Rule 56, Federal Rules of Civil Procedure. Where different inferences can be drawn from the same evidence, or where questions of credibility are present, summary judgment is not appropriate. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980); Eagle v. Louisiana Southern Life Insurance Company, 464 F.2d 607 (10th Cir. 1972).

In his First Claim for Relief, Plaintiff alleges that Defendant willfully and intentionally breached the provisions of the employment contract with Plaintiff by unilaterally modifying the commission schedule. Both parties have moved for summary judgment on this claim. The law in Colorado[1] is that in the absence of "special consideration or an express stipulation as to the duration of employment, an indefinite general hiring is terminable at will by either party." Lampe v. Presbyterian Medical Center, 590 P.2d 513, 514 (Colo. App. 1978). The parties are in agreement that the terms and conditions of Plaintiff's employment are set out in several letters exchanged by Plaintiff and Defendant in October, 1978. There is nothing in either letter that could reasonably be interpreted to construe Plaintiff's employment as being other than one terminable at will.

An employment contract that is terminable at will is also modifiable at will; a modification having the effect of terminating the existing contract and substituting in its place a new contract with the modified terms. Gebhard v. Royce Aluminum Corporation, 296 F.2d 17 (1st Cir. 1961); Bartinikas v. Clarklift of Chicago North, Inc., 508 F. Supp. 959 (N.D. Ill. 1981). Thus, Defendant's modification of its commission schedule in October, 1979, was not a breach of Plaintiff's employment contract. Additionally, it is undisputed that Plaintiff continued to work for Defendant as its

1. Because Plaintiff's employment with Defendant was centered in the State of Colorado, and because Colorado has an overriding interest in protecting its citizens in their employment, we find that the law of Colorado rather than that of either New York or New Jersey applies in this case.

Western Regional Sales Manager more than twenty-five months after the commission schedule was modified. During that period he accepted his full salary and commission based on the modified schedule. While Plaintiff voiced his disapproval of the modified schedule prior to its adoption, there is no evidence whatsoever to indicate that he ever objected to the schedule once adopted or refused to accept commissions earned under the new schedule. Such conduct constitutes acceptance of the modified contract as a matter of law. See Gebhard v. Royce Aluminum Corporation, supra., at 19. Thus, Plaintiff's Motion for Partial Summary Judgment is DENIED and Defendant's Motion for Summary Judgment, as to Plaintiff's First Claim for Relief, is GRANTED.

Having found the existence of an express employment contract during the entire term of Plaintiff's employment with Defendant, summary judgment must also be granted with respect to Plaintiff's Second Claim for Relief, but only to the extent that Plaintiff claims additional commission from the August 6, 1981 contract. While breach of contract and quantum meruit may be plead as alternative theroies of recovery, once an express contract providing for a fixed commission is established, Plaintiff is not entitled to recover on a quantum meruit. See eg. Jensen v. Neal, 124 P. 471 (Colo. 1912); Reitler v. Olson, 187 P. 313 (Colo. 1919); cf. Palmer v. Gleason, 389 P.2d 90 (Colo. 1964).

The Court does not, however grant summary judgment on Plaintiff's Second Claim for Relief as it relates to any commission which may or may not be due Plaintiff on the two contracts completed subsequent to his termination. The Colorado courts have made it clear that there is a distinction between the time when a commission is earned and when it is due and payable. Weick v. Rickenbaugh Cadillac Company, 303 P.2d 685, 687 (Colo. 1956). In the instant case, it is not clear from any of the letters evidencing Plaintiff's employment when a commission is earned. The affidavits submitted, and the other evidence, demonstrate a genuine issue of material fact on this point. Arguably, if Plaintiff can establish that a commission is earned

some time prior to the actual execution of the contract documents in the two subsequent sales to the Air Force, then he would be entitled to recover the reasonable value of his services on those two sales. Thus, summary judgment is inappropriate on this issue.

In his Third Claim for Relief, Plaintiff asserts fraudulent misrepresentation and/or concealment regarding Defendant's commission schedules and the ability of defendant to modify said schedules without his consent. We find that Plaintiff has demonstrated sufficient material issues of fact in dispute with respect to Defendant's representations and intent to withstand summary judgment on these claims. Defendant's Motion for Summary Judgment on Plaintiff's Third Claim for Relief is DENIED.

Finally, Plaintiff alleges that he was terminated in order to deprive him of further commissions on subsequent sales of PVD's to the Air Force. He asserts that such conduct constitutes a wrongful discharge in violation of Colorado law. He also alleges that such conduct is outrageous as that tort has developed in Colorado. Taking the facts, as we must, in the light most favorable to Plaintiff, we nonetheless conclude that summary judgment is appropriate on Plaintiff's Fourth Claim for Relief. We do not agree with Plaintiff that Colorado has adopted or even evinced an intent to adopt a "public policy" exception to the terminable at will doctrine. Even if such were the case, Plaintiff can point to no specific legislatively recognized policy which would protect him in this case. See Lampe v. Presbyterian Medical Center, supra. [where the Court of Appeals refused to hold for the plaintiff in spite of the existence of a "broad general statement of policy contained in a statute."] The fact remains that Plaintiff's employment was terminable at will, without cause. Plaintiff has not stated a cause of action for wrongful termination.

While the question whether Defendant has engaged in extreme and outrageous conduct is often a question of fact for the jury, the Court must make the threshold determination of whether reasonable persons could differ on the question. See Rawson v. Sears Roebuck & Company, 530 F. Supp.

776, 780 (D. Colo. 1982); Vigoda v. Denver Urban Renewal Authority, 624 P.2d 895, 898 (Colo. App. 1980). Taking the facts in the light most favorable to Plaintiff, we conclude that Defendant's conduct did not approach that level of conduct properly characterized as "outrageous." Compare with Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); Meiter v. Cavanaugh, 580 P.2d 399 (Colo. App. 1978). Defendant is entitled to summary judgment on Plaintiff's Fourth Claim for Relief.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Plaintiff's First and Fourth Claims for Relief are dismissed in toto. Plaintiff's Second Claim for Relief is dismissed only as it relates to a claim for additional commission on the August 6, 1981 sale. In all other respects, the Motion is denied.

DATED at Denver, Colorado this 31st day of May, 1983.

BY THE COURT:

/ signed /

SHERMAN G. FINESILVER, Chief Judge
United States District Court

APPENDIX II.B

JUDGMENT OF MARCH 26, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

JUDGMENT

THIS CAUSE having come on regularly for trial before the Court, The Honorable Sherman G. Finesilver, District Judge presiding, and a jury having been duly impannelled and sworn to try the issues herein and the trial having proceeded to conclusion and having been duly submitted to the jury and the jury having subsequently rendered its verdict. It is

ORDERED that judgment is entered in favor of the plaintiff and against the defendant on plaintiff's claim for implied contract as to the contract for the sale of 79 additional PVD units, in the amount of $5,000.00, together with interest at the rate of 10.60% from the date of entry of this judgment. It is

FURTHER ORDERED that judgment is entered in favor of the defendant and against the plaintiff on plaintiff's claims of fraudulent concealment, misrepresentation and claim for implied contract as to the contract for the sale of spare parts and accessories and those claims are hereby dismissed.

DATED at Denver, Colorado this 26th day of March, 1984.

FOR THE COURT:

/ signed /

JAMES R. MANSPEAKER, Clerk
United States District Court

APPENDIX II.C

ORDER OF MAY 14, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

IN THIS ACTION, Plaintiff originally sought recovery of compensatory and punitive damages, as well as costs and interest, on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent concealment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment. The Court dismissed Plaintiff's claims for breach of contract and wrongful termination, and dismissed, in part, Plaintiff's claim for quantum meruit, to the extent that said claim sought additional commissions on a sale which took place on August 6, 1983. A trial on this matter was held commencing June 6, 1983. Said trial resulted in mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00.

This matter is before the Court on the following motions: (1) Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984; (2) Amended Motion For a New Trial, Amendment Of Judgment, Relief From Judgement Or Order, filed by Plaintiff on April 6, 1984; (3) Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984; (4) Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984; and (5) Motion To Review Taxation Of Costs, filed by Defendant on April 16, 1984.

The Court has thoroughly reviewed the briefs, statements and affidavits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds as follows: (1) The Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, should be DENIED; (2) The Amended Motion For A New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 6, 1984, should be DENIED IN PART AND GRANTED IN PART; (3) The Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984, will be GRANTED to the extent that the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees; and (4) The Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be HELD IN ABEYANCE pending a determination of the amount of attorney's fees to be awarded in this case.

Plaintiff's Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order lists numerous grouds upon which Plaintiff maintains that he is entitled to a new trial or an altered or amended judgment. Each of these ground were considered and rejected by the Court prior to the trial or during the course of the trial on this matter. Plaintiff's motion does not provide the Court with any additional information or basis upon which we should alter our earlier rulings. Although the Court has again thoroughly reviewed the grounds asserted by the Plaintiff, the Court again finds that such

grounds are individually and collectively without merit. Accordingly, the Court finds that Plaintiff's motion should be DENIED.

Plaintiff's Amended Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order ("Plaintiff's Amended Motion") raises, for the first time, a claim for prejudgment interest on the $5,000.00 Judgment entered in his proceeding. Plaintiff asserts that he is entitled to prejudgment interest pursuant to C.R.S. §5-12-102, from February, 1982, the time at which Defendant booked the order for 79 PVD units which formed the basis fo the $5,000.00 Judgment in this case. Although Defendant maintains that Plaintiff is not entitled to prejudgment interest in this case, Defendant does not contest that the prejudgment interest, if awarded, should be calculated from February, 1982 until the date Judgment entered in this case.

C.R.S. §5-12-102(1) provides a statutory basis for prejudgment interest when money or property has been wrongfully withheld:

> Except as provided in section 13-21-101, C.R.S., when there is no agreement as to the rate thereof, creditors shall receive interest as follows: (a) When money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered, whichever first occurs; or, at the election of the claimant, . . .
> (b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys . . . after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs. (Emphasis added).

The mandatory language of C.R.S §5-12-102(1) clearly indicates that prejudgment interest is recoverable under this statute as a matter of right where a Plaintiff falls within the requirements of the statute. See e.g., Hayes v. North Table Mountain Corp., 608 P.2d 830 (Colo. Ct. App. 1980). Furthermore, C.R.S. §5-12-102(3) provides that "Interest shall be allowed as

provided in [C.R.S. §5-12-102(1)] even if the amount is unliquidated at the time of wrongful withholding or at the time when due." See also Jasken v. Sheehy Constr. Co., 642 P.2d 58 (Colo. Ct. App. 1982).

Defendant maintains, in part, that Plaintiff is not entitled to an award of prejudgment interest because Plaintiff's Amended Motion was not filed in a timely manner. Plaintiff responds that the Amended Motion was filed in a timely manner pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. The Court is of the view that Plaintiff's request for prejudgment interest is untimely if considered as a motion pursuant to Rule 59(b) and 59(e) of the Federal Rules of Civil Procedure. The Court finds, however, that Plaintiff's request is timely and appropriate when considered as a motion for the correction of a clerical error under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 59 of the Federal Rules of Civil Procedure provides that a motion for a new trial and a motion for amendment of judgment must be served not later than 10 days after entry of judgment. In addition, Rule 6(b) of the Federal Rules of Civil Procedure expressly states that this time period may not be enlarged by the Court. See 6A Moore's Federal Practice ¶59.09[1] (and the cases cited therein).

In the instant case, as noted above, Judgment entered on March 26, 1984. Plaintiff filed and served its Amended Motion on April 6, 1984, eleven days after entry of Judgment. Therefore, Plaintiff's motion was not filed in a timely manner as required by Rule 59 of the Federal Rules of Civil Procedure.

We are not persuaded by Plaintiff's argument that the ten day period was extended by three days pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. Rule 6(e) provides for an extension of time for actions which must be taken within a prescribed period after the service of a notice or other paper when such service is effected by mail. Rule 6(e), F.R.Civ.P. The time for filing a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure is not enlarged by Rule 6(e) because the ten day period in which

they must be filed runs from entry of judgment rather than from receipt of notice. See Flint v. Howard, 464 F.2d 1084 (1st Cir. 1972); Wright & Miller, Federal Practice and Procedure § 1171; 2 Moore's Federal Practice ¶6.12. See also Reynolds v. Hunt Oil Co., 643 F.2d 1042 (5th Cir. 1981); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenback, 525 F.2d 1179 (8th Cir. 1975). We find particularly persuasive on this point the reasoning articulated by the First Circuit Court of Appeals in Flint v. Howard, supra:

> A second alleged ground for rehearing is a plea to add the three-day grace period described in Rule 6(e), Fed.R.Civ.P., to the time allowed for filing a Rule 52 or 59 motion. The problem with this argument is that Rules 52 and 59 both provide that the 10 days within which a motion for reconsideration must be filed begins to run from "entry of judgment" rather than from receipt of notice and Rule 6(b), Fed.R.Civ.P., prohibits enlargement of such time. Petitioner's ingenious and undocumented effort to justify an additional three-day mailing period does not persuade us.

Flint v. Howard, 464 F.2d at 1086. Accordingly we find that Plaintiff's Amended Motion should be DENIED to the extent that it seeks to assert a claim under Rule 59 of the Federal Rules of Civil Procedure.

Although the issue was not raised, as such, by the Plaintiff, the Court is of the view that Plaintiff's request for prejudgment interest should be considered as a timely request under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 60(a) provides, in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60(a), Fed.R.Civ.P. Motions filed under Rule 60(a) are clearly not restricted by the ten day rule established by Rule 59 of the Federal Rules of

Civil Procedure.

Where a prevailing party has an unconditional statutory right to prejudgment interest on an award, the failure to include the interest in the judgment is a "clerical mistake" that can be corrected under Rule 60(a). See Hayden v. Scott Aviation, Inc., 684 F.2d 270 (3rd Cir. 1982); Glick v. White Motor Co., 458 F.2d 1287, 1293-94 (3rd Cir. 1972); Gilroy v. Erie-Lachawann R.R., 44 F.R.D. 3, 4 (S.D.N.Y.); In re Merry Queen Transfer Corp., 266 F. Supp. 605, 607 (E.D.N.Y. 1967) modified in other respects sub nom., O'Rourke v. Queen Transfer Corp., 370 F.2d 781 (2nd Cir. 1967); Wright & Miller, Federal Practice and Procedure §2854. Cf. Goodman v. Heublein, 682 F.2d 44 (2nd Cir. 1982) (Court acknowledged that where state substantive law provided right to prejudgment interest, failure to provide such interest could be characterized as clerical error under Rule 60(a); however, rule was inapplicable where award of prejudgment interest under ADEA was governed by federal, not state, law). But see Chicago & N.W.Ry.Co. v. Union Packing Co., 527 F.2d 592 (8th Cir. 1976). On the other hand, if granting prejudgment interest is within the discretion of the court, the judgment must be amended pursuant to Rule 59 of the Federal Rules of Civil Procedure. See Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983), cert. denied 104 S.Ct. 487 (1984); Scola v. Boat Frances, R., Inc., 618 F.2d 147 (1st Cir. 1980).

In the instant case, as noted above, the Court is of the view that prejudgment interest is available to the Plaintiff as a matter of right pursuant to C.R.S. §5-12-102(1). Accordingly, the Court finds that Plaintiff's request for prejudgment interest can be considered a timely request pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

Defendant maintains that Plaintiff's request for prejudgment interest, even if timely, should be denied because Plaintiff did not raise or address this issue at or before the trial in this case. The Court finds this argument to be without merit. The Court initially notes that Plaintiff's Complaint contained a request for an award of interest. Furthermore, courts have

consistently held that a plaintiff's failure to pursue his request for prejudgment interest during the trial, or even to demand such interest in his complaint, does not amount to a waiver of his right to interest. See Mallis v. Bankers Trust Co., 717 F.2d 683 (2nd Cir. 1983) (and cases cited therein). Accordingly, the Court finds that Plaintiff has not waived his claim for prejudgment interest in the instant case.

Defendant's final objection to Plaintiff's claim for prejudgment interest is that C.R.S. §8-4-101 does not authorize prejudgment interest in the instant case. The Court acknowledges that C.R.S. §8-4-101 does not authorize an award of prejudgment interest in this case; however, the basis for such an award, as noted above, is C.R.S. §5-12-102. C.R.S. §8-4-101, et seq., is relevent to this discussion, if at all, as a means for determining the time from which the interest in question should be calculated. As noted above, in Hayes v. North Table Mt. Corp., supra, the Colorado Court of Appeals held that interest on a brokerage commission, awarded pursuant to C.R.S. §5-12-102, was due on the commission from the date that the commission was due and payable. C.R.S. §8-4-104 lends additional support to this conclusion. The Colorado Court of Appeals, in interpreting C.R.S. §8-4-104(2), has concluded that commissions not fully earned at the time of termination need not be paid under this provision at the time of termination; however, such wages become immediately due at the time they were fully earned. See Hofer v. Polly Little Realtors, Inc., 37 Colo. App. 86, 543 P.2d 114 (1975). Accordingly, the Court finds that Plaintiff is entitled to an award of prejudgment interest on the $5,000.00 commission which formed the basis of the jury verdict in this case from the date that the commission was due and payable.

Plaintiff maintains that this right to prejudgment interest commenced in February, 1982, at the time the Defendant booked the 79 PVD order for $600,013.00. Defendant does not contest Plaintiff's assertion that prejudgment interest, if it is to be awarded in this case, should be calculated from February, 1982. Furthermore, the Court ntoes that the pretrial order in this case lists, as an "uncontroverted fact," that "a formal written contract was

executed in January, 1982 regarding the $600,013.00 purchase of additional PVD units." Therefore, the Court finds that Plaintiff is entitled to an award of prejudgment intrest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually.

In his motion for attorney's fees, Plaintiff maintains that he is entitled to an award of reasonable attorney's fees pursuant to C.R.S.§8-4-114.

C.R.S. §8-4-114 provides:

> Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

The Colorado Court of Appeals has explained that recovery of attorney's fees under C.R.S. §8-4-114 is a matter of right, and only the amount of such a recovery is within the discretion of the trial court:

> Section 114, in providing that the judgment "shall include a reasonable attorney fee in favor of the winning party," leaves nothing to the discretion of the trial court except to determine what is a "reasonable fee."

Keeton v. Rike, 559 P.2d 262, 263 (Colo. Ct. App. 1977). See also Hofer v. Polly Little Realtors, supra.

The Court is of the view that the $5,000.00 judgment in this case is based on a claim for wages within the meaning of C.R.S.§8-4-104, 8-4-105. Commissions are clearly within the definition of "wages" for purposes of these provisions. See C.R.S. §8-4-101(9); Hofer v. Polly Little Realtors, Inc., supra. Therefore, the Court finds that Plaintiff is entitled to an award of reasonable attorneys fees with respect to the recovery of said wages pursuant to C.R.S. §8-4-114.

The Court rejects Defendant's argument that attorney's fees are not recoverable under C.R.S. §8-4-114 for a claim based on quantum meruit.

C.R.S. §8-4-114, in defining "wages or compensation" for purposes of these provisions, specifies that the terms include amounts owed "...whether the labor or service is performed under contract, subcontract, partnership, subpartnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment." Furthermore, C.R.S.§8-4-104 provides, in pertinent part, that wages or compensation become due and payable "...when an employee not having a written contract for a definite period quits or resigns his employment." These provisions clearly suggest that C.R.S. §§ 8-4-104, 8-4-05 and 8-4-114 are not limited to cases involving wages or compensation due pursuant to a written contract. Therefore, the Court finds that attorneys fees are recoverable under C.R.S. §8-4-114 regardless of whether a plaintiff's claim is based on breach of contract or quantum meruit.

The Court also rejects Defendant's argument that C.R.S. §8-4-104 conditions recovery of attorney's fees upon a determination of the employer's lack of a good-faith legal justification for the refusal to pay wages in a timely fashion. The provision to which the Defendant apparently refers, C.R.S. §8-4-104(3) provides for a penalty to be added to the compensation legally proven to be due, in an amount equal to fifty percent thereof, if an employer refuses to pay wages or compensation without a good-faith legal justification for such refusal. However, an award of attorney's fees under C.R.S. §8-4-114 is not dependent on an imposition of a penalty under C.R.S. §8-4-104. See Keeton v. Rike, supra, Hofer v. Polly Little Realtors, Inc., supra. Accordingly, the lack of a finding in this case regarding Defendant's good-faith legal justification in refusing to pay the wages in question does not affect Plaintiff's claim for attorney's fees under C.R.S. §8-4-114.

Defendant's final objection to Plaintiff's motion for attorney's fees is that Plaintiff has failed to file adequate records in support of his request as required by Rule 104 of our Local Rules of Practice. The Court is of the view, however, that this goes to the reasonableness of the attorney's fees in question, as opposed to Plaintiff's right to such an award.

Accordingly, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees pursuant to C.R.S. §8-4-114, with respect to the $5,000.00 judgment in the instant case.

As noted above, the reasonableness of an award of attorney's fees under C.R.S §8-4-114 is within the discretion of the trial court. In the instant case, we are of the view that the amount requested by Plaintiff, $52,198.00, would not be a reasonable award of attorney's fees pursuant to C.R.S. §8-4-114.

Although Plaintiff was technically the "winning party" in this action, in that the jury awarded the Plaintiff $5,000.00 in damages, it is necessary to keep in mind that the Plaintiff recovered on only one of several claims that he originally filed in this case. As noted above, a portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. The Court is of the opinion that the "proportionate recovery rule," traditionally applied in cases involving claims for attorney's fees under 28 U.S.C. §1988, must also be applied to claims for attorney's fees under C.R.S. §8-4-114. In Scheriff v. Beck, 452 F.Supp 1254 (D.Colo. 1978), the Court explained:

> [W]e recognize the rule in the Tenth Circuit that "when a party has prevailed in a court action . . . he may be entitled to attorney's fees proportionate to the extent of his recovery." Pearson v. Western Electric Co., 542 F.2d 1150, 1153 (10th Cir. 1976). (citations omitted)... Applying the proportionate recovery rule plaintiff's fee request must again be reduced. Plaintiff was permitted to present three separate civil rights claims to the jury and recovered only on one. Any recovery granted should take into accont this disparity.

Id. at 1259. See also Keyes v. School Dist. No. 1, 439 F.Supp. 393 (D.Colo. 1977); Perkins v. New Orleans Athletic Club, 429 F.Supp. 661 (E.D.La. 1976). Accordingly, we are of the view that Plaintiff is not entitled to recovery of all of the attorney's fees incurred.

The Court also notes that any attorney's fees awarded under C.R.S. §8-4-114 are to be "taxed as part of the costs of the action." See C.R.S. §8-4-114. In this case, as will be discussed below, the award of costs may be affected by the offer of judgment submitted by Defendant under Rule 68 of the Federal Rules of Civil Procedure. Accordingly, any award of attorney's fees may be significantly reduced as a result of Defendant's offer of judgment.

In light of these factors, as well as the factors outlines in Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981) and Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980), the Court is of the opinion that the amount requested by the Plaintiff does not represent a "reasonable" amount of attorney's fees under C.R.S. §8-4-114. As will be described below, Plaintiff will be permitted to submit the necessary documentation in order to support his claim for a reasonable award of attorney's fees in this case.

Both parties have moved this Court to review the taxation of costs by the Clerk of the Court. The amount of costs to be taxed in this case depends to a great extent, however, on the final resolution of Plaintiff's request for attorney's fees under C.R.S. §8-4-114. Any attorneys fees awarded must be included in the costs taxed in this action. Furthermore, just as the offer of judgment in this case could reduce any award of attorney's fees, an award of attorney's fees could conceivably alter the role that the offer of judgment would normally play in the taxation of costs. Accordingly, the parties' motions to review taxation of casts will be HELD IN ABEYANCE pending a determination of a reasonable award of attorney's fees in this case.

The Court is of the view that the parties should be able to reach an agreement which would resolve the issues in this case which remain viable at this time. The Court is of the opinion that the interests of both parties would be well served if the parties could reach an agreement, in light of the factors cited above, as to a reasonable award of attorney's fees in this action. The added time, effort and expense which will be required to have this matter resolved by the Court, will most likely eliminate any benefit that either party

could hope to receive from an award of costs or attorney's fees in this action. Accordingly, the parties are DIRECTED to make every effort to resolve this matter. The Court is to be advised, in writing, by 5:00 p.m. on May 30, 1984, regarding the results of the parties' efforts.

In the event that the parties are unable to resolve these matters, Plaintiff is DIRECTED to file with the Court, by 5:00 p.m. on June 6, 1984, a statement, together with all documents requried by Rule 104 of our Local Rules of Practice, in support of his claim for reasonable attorney's fees. Plaintiff's statement should include, to the greatest extent possible, a discussion of the amount of fees, reasonably necessary to the recovery of the $5,000.00 judgment in this case, which were incurred before and after the filing of Defendant's offer of judgment. Defendant is DIRECTED to file a response to Plaintiff's statement by 5:00 p.m. on June 15, 1984. Unless otherwise ordered, the Court will rule on this matter without oral argument.

— ORDER —

For the reasons stated above, the Motion For New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, is DENIED.

The Amended Motion For A New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 6, 1984, is GRANTED to the extent that Plaintiff is awarded prejudgment interest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually. Plaintiff's Amended Motion, in all other respects is DENIED.

The Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984, is GRANTED to the extent that Plaintiff is entitled to reasonable attorney's fees in this case. A determination of the amount of attorney's fees to be awarded will be HELD IN ABEYANCE pending completion of the

briefing schedule outlined in this order.

The Motion To Review Taxation Of Costs filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be HELD IN ABEYANCE pending a determination of the amount of attorney's fees to be awarded in this case.

DATED at Denver, Colorado this 17th day of May, 1984.

BY THE COURT:

/ signed /

Sherman G. Finesilver, Chief Judge
United States District Court

APPENDIX II.D

ORDER OF JULY 3, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON & COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

PLAINTIFF originally brought this action seeking recovery of compensatory and punitive damages on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent concealment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment, and dismissed Plaintiff's claims for breach of contract, wrongful termination, outrageous conduct, and quantum meruit on the original contract entered into by the parties. A trial on this matter was held commencing June 6, 1983. Said trial resulted in a mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00. On May 14, 1984, the Court entered an order denying Plaintiff's motion for a new trial, amendment of judgment, and relief from judgment or order. The Court granted in part and denied in part Plaintiff's amended motion for a new trial, amendment of judgment and relief from

judgment or order, and awarded the Plaintiff prejudgment interest on the $5,000.00 judgment previously entered in this case. Plaintiff's motion for attorney's fees was granted to the extent that the Court found that Plaintiff is entitled to an award of reasonable attorney's fees; however, the Court held in abeyance a determination of the amount of attorney's fees to be awarded to the Plaintiff.

This matter is before the court on the following motions: (1) a motion for attorney's fees, filed by Plaintiff on April 2, 1984; (2) a motion to review taxation of costs, filed by Plaintiff on April 13, 1984; and (3) a motion to review taxation of costs, filed by Defendant on April 16, 1984. The Court has thoroughly reviewed these motions, as well as the briefs, affidavits and exhibits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds that Plaintiff is entitled to an award of attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case. The Court further finds that Plaintiff is entitled to an award of costs in this case; however, said award will be limited by the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff originally requested an award of $52,198.00 in attorney's fees with respect to the $5,000.00 judgment entered in this case. This amount was apparently based on the attorney's fees incurred by the Plaintiff with respect to all of the claims for relief asserted by the Plaintiff in the instant case. In our May 14, 1984 order, the Court explained that in calculating the attorney's fees to be awarded in the instant case it is necessary to consider that the Plaintiff recovered on only one of several claims that he originally asserted against the Defendant. A portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. Plaintiff's claim for attorney's fees obviously must be reduced to take into account these factors. See e.g. Pearson v. Western Electric Co., 542 F.2d 1150 (10th Cir.

1976); Scheriff v. Beck, 452 F.Supp. 1254 (D.Colo. 1978).

Plaintiff, in response to the Court's May 14, 1984 order, submitted a claim for attorney's fees in the amount of $17,132.74, based on Plaintiff's estimate of the fees to be awarded under the "proportionate recovery" analysis described by the Court. In addition, Plaintiff submitted an alternative claim for $18,855.00 in attorney's fees based on a "hypothetical case basis" as the prevailing party on the claim for which judgment was entered in the amount of $5,000.00. The Court is of the view that Plaintiff's requests are unreasonable, and that Plaintiff should be awarded a total of $1,000.00 for reasonable attorney's fees in the instant case.

Initially, the Court notes that even if Plaintiff's request was considered reasonable, the request must be substantially reduced as a result of the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. As the Court explained in our May 14, 1984 order, any award of attorney's fees in this case must be taxed as costs, and come within the limitations of a valid offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Defendants submitted an offer of judgment on February 15, 1984, in the amount of $27,000. Said offer was rejected by the Defendant, and the offer clearly exceeds the amount of judgment entered in this case together with the amount of costs (including the amount of attorney's fees sought by the Plaintiff) prior to the date the offer was made. Furthermore, the Court finds Plaintiff's arguments regarding the validity of the Defendant's offer of judgment to be without merit. The Court has thoroughly reviewed Defendant's offer of judgment, and finds that it is sufficient to meet the requirements of Rule 68 of the Federal Rules of Civil Procedure. Therefore, the Court finds that Plaintiff is not entitled to an award of any costs which might have been incurred after February 15, 1984. Accordingly, Plaintiff is not entitled to an award for any attorney's fees incurred after February 15, 1984.

Plaintiff's request must be further reduced to accurately reflect the limited recovery achieved by the Plaintiff. As we have repeatedly noted,

Plaintiff was the "prevailing party" in this case with respect to only one of several claims that he originally brought against the Defendant. In terms of the legal issues involved in Plaintiff's various claims, the discovery reasonably required for presentation of the claims, and the relief requested with respect to the Plaintiff's claims, the single claim upon which the Plaintiff ultimately prevailed was clearly the most limited in scope of all the Plaintiff's claims. Where a plaintiff has enjoyed only a limited success, a reasonable fee must be determined in relationship to the results obtained, and a reduced award is justified where the relief is limited in comparison to the scope of the litigation as a whole. See Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

Upon a review of the records submitted by the Plaintiff, the Court finds that the Plaintiff's request for attorney's fees contains claims for time, travel and discovery which were not necessary or related to the $5,000.00 judgment entered for the Plaintiff. The Court is not willing to require the Defendant to bear the burden of financing Plaintiff's largely unsuccessful lawsuit, particularly in light of the offer of judgment that was filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. Furthermore, the Court is of the view that equitable considerations support an extremely limited award of attorney's fees in the instant case. The Defendant clearly prevailed on several claims in this case, and Defendant is arguably a "prevailing party" entitled to an award of attorney's fees under C.R.S. §8-4-114. See e.g. Hartman v. Freedman, 591 P.2d 1318 (1979). Although the Defendant did not file a motion for an award of attorney's fees in this case, and the Court makes no finding as to whether the Defendant would have been entitled to such an award, a realistic examination of which party actually "prevailed" in this case clearly suggests that the Plaintiff should receive at most an extremely limited award of attorney's fees.

In addition to the factors specifically discussed in this order, the Court, in determining the amount of attorney's fees to be awarded in this case, has considered the factors articulated in Hensley v. Eckerhart, supra; Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); and Battle v. Anderson, 614

F.2d 251 (10th Cir. 1980). Upon a consideration of the relevant factors, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case.

— ORDER —

For the reasons stated above, Plaintiff's motion for attorney's fees is GRANTED to the extent that Plaintiff is awarded the amount of $1,000.00 in attorney's fees, to be taxed as costs in the instant case.

Defendant's motion to review taxation of costs is DENIED. The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff's motion to review taxation of costs is GRANTED to the extent that this matter is REMANDED to the Clerk of the Court for taxation of costs in accordance with this order.

DATED at Denver, Colorado this 3rd day of July, 1984.

BY THE COURT:

/ signed /

Sherman G. Finesilver, Chief Judge
United States District Court

APPENDIX II.E

ORDER OF AUGUST 1, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON & COMPANY

Defendant.

— ORDER —

SHERMAN G. FINESILVER, CHIEF JUDGE

THIS MATTER IS BEFORE THE COURT on the plaintiff's motion for amendment of order, or relief from judgment and order. Plaintiff seeks an increase in the amount of attorney's fees awarded to him by this Court's Order dated July 3, 1984. The gist of the motion is the Court's award of fees is unjust, arbitrary, without factual and legal basis, and in the nature of a penalty. The Court has considered the plaintiff's motion. In addition, the Court has carefully reconsidered its Order of July 3, 1984. The award of fees was based on substantial evidence before the Court.

The July 3, 1984 Order takes into account the factors demanded under the applicable case law to be considered in an award of attorney's fees. Mau v. E.P.H. Corp., 638 P.2d 777 (1981); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1890); Hensley v. Eckerhart, 103 S. Ct. 1933 (1983). Budinich prevailed on one of six claims brought, winning a $5,000 verdict out of $650,000 in damages originally sought. The plaintiff is entitled to a reasonable attorney's fee. In the Order, the Court noted the claim upon which Budinich did prevail was the most limited in scope of all the claims. The claim was in no sense complex, either legally or factually. The Court further noted the plaintiff's very limited success, and found, in

light of the scope of the litigation as a whole, a reduced award was indeed justified. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983).

In addition to the above findings, the Court also found the request for fees contained time, travel and discovery which were neither necessary nor related to the judgment entered for Budinich. The Court found a valid offer of judgment had been made on February 15, 1984, by the defendant. The amount of the offer was $27,000. Although the Court awarded no fees to the Defendant, the Court did find the defendant was arguably a "prevailing party", noting a realistic examination of which party actually "prevailed" suggested the plaintiff should receive at most an extremely limited award of fees.

The Court is not insensitive to the purposes behind C.R.S. §8-4-114. However, as states in the July 3 Order, the Court is unwilling to require the defendant to finance a largely unsuccessful lawsuit against itself. Accordingly, the plaintiff's motion for amendment of order, or relief from judgment and order is DENIED.

Dated at Denver, Colorado, this 1st day of August, 1984.

BY THE COURT:

/ signed /

SHERMAN G. FINESILVER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX III.A

PETITION FOR REHEARING FILED IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 84-2192

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

vs.

BECTON DICKINSON AND COMPANY,

Defendant-Appellee.

PETITION FOR REHEARING

Appellant, Joseph G. Budinich, through the undersigned legal counsel, Frank & Finger, P.C., hereby petitions pursuant to Rule 40 of the Federal Rules of Appellate Procedure for rehearing of this Court's Judgment entered December 12, 1986.

Appellant requests that the Court reconsider and determine the issues of timeliness of this appeal, non-retroactivity, and the award of attorney fees for the reasons set forth herein.

Additionally, Appellant would note that an error appears in the recitation of facts in that the opinion erroneously states that the pleading were amended after Summary Judgment entered. This is not accurate. Amendment occurred prior to Summary Judgment.

I. THE COURT'S HOLDING ON TIMELINESS OF THE APPEAL SHOULD BE MODIFIED

The Court's holding that a uniform, unqualified rule that attorney fee awards are collateral to the relief obtained is appropriate in cases where federal law controls, but is inappropriate in pure diversity cases, where substantive state law controls and is contrary to the federal law.

The Constitution of the United States established a rigid balance between the rights granted to the federal government and those rights retained by the states. In that regard, the Tenth Amendment to the United States Constitution specifically reserved unto the states all power not delegated to the United States by the Constitution.

The right of the states to enact their own substantive standards has been repeatedly upheld. Only where such law directly interferes or transgresses on the Commerce Clause or areas expressly preempted have such laws been held to be superseded by Congressional mandate. United States v. Darby, 312 U.S. 100, 85 L.Ed. 609, 61 S. Ct. 451 (1941).

Colorado, in providing for labor relations in its state enacted a statute requiring payment of wages on discharge and specifically provided for an award of mandatory attorney fees for violation of that proscription. By case law of the State of Colorado this provision has been determined to be an inherent part of the relief where the statute is violated. Ortega v. Board County Commissioners, 657 P.2d 989 (Colo. App. 1982 cert. denied); Ball Corporation v. Loran, 42 Colo. App. 401, 496 P.2d 412 (Colo. App., 1979); Marieta v. Busto, 91 P.2d 345 (Colo. App., 1984) cert. denied.

The federal judiciary has no power to modify, change or reverse this substantive determination, unless the holding is unconstitutional or preempted. No such argument of unconstitutionality or preemption is made here.

Clearly, the provision providing for United States District Court's original jurisdiction over diversity actions, 28 U.S.C. §1332, which in and of itself does not emanate from the United States Constitution, cannot preempt Colorado substantive law. Kline v. Burke Construction Co., 260 U.S. 226, 67 L.Ed. 226, 43 S. Ct. 79 (1922).

Yet, that is exactly what this Court has done in its December 12, 1986 order. It has substantively changed the law of the State of Colorado. That procedure is violative of fundamental Constitutional principles and a marked departure from the teachings of Erie Railroad Co. v. Tompkins, 304

U.S. 64 (1938) and even Hanna v. Plumer, 380 U.S. 460 (1965). The determination is most certainly "outcome determinative" and clearly a new pronouncement of law.

II. THE DECISION SHOULD BE GIVEN ONLY PROSPECTIVE APPLICATION

The December 12, 1986 decision of the Court is a new determination of the law. For the first time in this Circuit or any other circuit to Appellant's knowledge has a court grappled with the concept of whether state substantive law on attorney fees controls in diversity cases, and its import to the teachings of White v. New Hampshire, 455 U.S. 445 (1982).

Non-retroactivity is clearly inappropriate in this matter for the reasons previously set forth in Appellant's prior brief.

III. THE ATTORNEY FEE AWARD REQUIRES FURTHER EXAMINATION

In disposing of the attorney fee award question, as it did, this Court failed to perceive that briefs on the merits have not been filed or authorized. The only issues briefed and submitted to the Court were briefs on the merits of the question of summary disposition based on jurisdictional arguments.

The District Court's decision on attorney fees is clearly erroneous. Facts and critical determinations, such as number of hours worked on the claim, hourly rate, defendant engaging in extensive discovery and the like, have never been presented because of the posture of the case. The Court, in its holding that the attorney fee question is properly before it, now should examine the merits.

Appellant asks only for fundamental fairness in presenting the issues to the Court. The $1,000.00 attorney fee award is far less compensation

than is justified by any objective standard relating to time expense in proving the wage claim for the supplemental order.

An examination of the record with brief will easily clarify the erroneous attorney fee holding.

IV. CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests rehearing and modification of this Court's order of December 12, 1986, and specifically asks this Court to consider the appeal in its entirety on the merits.

Respectfully submitted,
FRANK & FINGER, P.C.

By: / signed /
William S. Finger, #7224
Attorneys for Plaintiff-Appellant
29025D Lakepoint Center
P.O. Box 1477
Evergreen, CO 80439

Certificate of Mailing

I hereby certify that on the 13 day of August 1987, I placed three true and correct copies of the foregoing application for Petition for Writ of certiorari in the United States Mail, first class, postage fully prepaid and properly addressed to:

Terre Lee Rushton, Esq.
Kelly, Haglund, Garnsey
and Kahn
1441 18th Street
Suite 300
Denver, Colorado 80202

Thomas E. Frank

Thomas E. Frank

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH G. BUDINICH,

Petitioner,

v.

BECTON DICKINSON AND COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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* Counsel of Record

September, 1987

QUESTIONS PRESENTED

1. Whether the time in which to appeal a judgment of the federal district court is governed by federal law and procedure?

2. Whether an appeal from a final judgment on the merits of an action is untimely when it is not filed within the time set by the Federal Rules of Appellate Procedure, where an order taxing attorneys fees as costs of the action is pending?

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No. 87-283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH G. BUDINICH,

Petitioner,

v.

BECTON DICKINSON AND COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Becton Dickinson and Company, respectfully requests that this court deny the petition for writ of certiorari filed by petitioner, Joseph G. Budinich, seeking review of the opinion of the Tenth Circuit Court of Appeals in this case.

STATEMENT OF THE CASE

This matter arises out of an employment contract under which the petitioner served as respondent's Western Regional Manager for a salary plus a commission on sales. Prior to the completion of a major sale of vapor sensing equipment to the United States Air Force, respondent modified its commission structure applicable to employees on petitioner's level. Although petitioner initially protested the consequent reduction in the commission expected on that sale, he continued employment with the respondent for more than two years after the commission change. Petitioner was terminated from his position in November of 1981.

In February, 1982, Petitioner filed this action in the Denver District Court, City and County of Denver, State of Colorado. The matter was removed to the United States District Court for the District of Colorado on the basis of the diversity of citizenship of the parties.

Petitioner's original action asserted claims for breach of contract (wrongful termination), quantum meruit, misrepresentation and outrageous conduct. Prior to the trial on these issues, the District Court granted summary judgment in favor of the respondent on the claims for breach of contract and outrageous conduct. After trial to a jury, verdict was entered for the respondent on the misrepresentation and implied contract claims. The petitioner prevailed solely on his claim for additional commissions on a post-termination supplemental purchase order and was awarded $5,000. No claim for attorneys fees was raised, either in the complaint or any of the pleadings. No evidence was presented on attorneys fees during the course of these proceedings.

Judgment entered on March 26, 1984. On March 30, 1984, petitioner filed a bill of costs raising a claim for attorneys fees for the first time. On April 2, 1984 petitioner filed a Motion for Attorney's Fees simultaneously with a Motion for New Trial, Amendment of Judgment and Relief from Judgment or Order. On May 14, 1984, the District Court denied the substantive motions but granted petitioner's Motion for Attorney's Fees. In that Order, the Court determined that under the Colorado Revised Statutes, § 8-4-114, a winning party was entitled to attorneys fees to be taxed as part of the costs of the action. ("Any attorney's fees awarded must be included in the costs taxed in this action.") (Appendix, page 35a). Subsequently, on July 3, 1984 the court entered an order awarding attorneys fees to the petitioner in the amount of $1,000.

Petitioner then filed a Motion for Relief from Judgment relating to attorneys fees. That motion was denied on August 1, 1984. Petitioner filed his only notice of appeal on August 29,

1984. The Tenth Circuit Court of Appeals, relying upon its decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), found the appeal to be untimely and granted respondent's motion for summary dismissal. An order of dismissal was entered as to all issues except the amount of attorneys fees, which was affirmed. The petitioners Petition for Rehearing was denied on March 26, 1984. This Petition for Certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

In seeking certiorari, petitioner, Joseph G. Budinich claims that the decision of the U.S. Court of Appeals for the Tenth Circuit in this case, founded upon its ruling in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), is in conflict with decisions of this court and in conflict with decisions of other circuit courts of appeals. Respondent, Becton Dickinson and Company, respectfully submits that the approach adopted by the Tenth Circuit and the majority of circuit courts is in accord with the decisions of this court regarding the finality of judgments and time limits for appeal. Moreover, under the facts of this case, application of the guidelines adopted by those federal courts of appeal cited by petitioner in support of his position would yield a result identical with that of the Tenth Circuit; to wit, that the petitioner's failure to file an appeal of the judgment entered in this matter within thirty days of the entry of that judgment barred his appeal, regardless of the fact that a motion to tax attorneys fees as costs was still pending. Petitioner has cited no authority to invoke the jurisdiction of this court under United States Supreme Court Rules 17.1. For that reason, and the reasons set forth more fully below, Mr. Budinich's position does not justify review on certiorari.

I. CERTIORARI IS INAPPROPRIATE WHERE THE STANDING DECISIONS OF THIS COURT SUPPORT THE APPELLATE COURT'S DETERMINATION THAT TIME LIMITS FOR FILING AN APPEAL ARE GOVERNED BY FEDERAL LAW AND PROCEDURE.

The petitioner herein seeks to distinguish this case from the rule adopted by the majority of circuit courts that a decision on the merits is final and appealable regardless of the pendency of a motion for attorneys fees. In attempting to preserve his appeal of the adverse judgment in this matter, petitioner first alleges error in the Tenth Circuit's application of its decision in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982) to a diversity action. Applying *Cox*, the Tenth Circuit determined that petitioner's appeal of the judgment on the merits was untimely, having been filed outside of the thirty day time limit set forth in Federal Rule of Appellate Procedure, Rule 4, which states:

> In a civil case in which an appeal is permitted by law as a right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within thirty days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals will note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

The petitioner seeks to characterize the specification of time for filing an appeal from a final judgment in a diversity action as a substantive matter, governed by state law under the rule of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Petitioner's argument is without merit.

It is long settled that matters of federal court procedure are controlled by federal law. *Hanna v. Plummer*, 85 S.Ct. 1136, 380 U.S. 460 (1965), 14 L.Ed.2d 8, (1965); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 78 S.Ct. 893, 356 U.S. 525, 2 L.Ed. 2d 953 (1958); *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982). As *Cox v. Flood, supra*, illustrates, even in those decisions where the appellate courts have determined that, in diversity actions, the underlying relationship of attorneys fees to the merits is a matter of state law, federal law has been applied to the ultimate issue of appellate jurisdiction. See *Certain British Underwriters v. Jet Charter Service, Inc.*, 739 F.2d 534, 535-36 (11th Cir. 1984) (rules of state procedures are not binding in a federal diversity case) and *Oxford Production Credit Association v. Duckworth*, 689 F.2d 587, 588-89 (5th Cir. 1982). Petitioner has cited no authority for his argument that state law should govern the purely procedural question of the time strictures for the filing of an appeal, and this court should deny certiorari on that ground.

II. CERTIORARI IS INAPPROPRIATE WHERE THE APPELLATE COURT'S DETERMINATION OF THE TIMELINESS OF THIS APPEAL IS SUPPORTED BY THE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS OF APPEAL.

Petitioner argues that, if the timeliness of an appeal is indeed a matter of federal law, then the approach adopted by the majority of the circuit courts of appeal, including the Tenth Circuit, is erroneous. That approach is derived from the decision in *White v. New Hampshire*, 102 S. Ct. 1162 (1982), 455 U.S. 445, 71 L.Ed. 2d 325. Under the majority rule, derived from *White*, a judgment finally disposing of the merits of a case is appealable, and triggers the time for appealing,

regardless of the pendency of a claim for attorneys fees and regardless of whether the claim for fees is characterized as integral or collateral to the merits of the case. That uniform, unqualified rule is the only fair approach to utilize when applying a procedural rule that may in fact require forfeiture of the underlying claim. See *Cox v. Flood, supra; West v. Keve,* 721 F.2d 91 (3rd Cir. 1983); *Smillis v. Park Chemical,* 710 F.2d 271 (6th Cir. 1983); *Exchange National Bank of Chicago v. Daniel,* 763 F.2d 286 (7th Cir. 1985); *International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers Local v. Madison Industries, Inc.,* 733 F.2d 656 (9th Cir. 1984).

Petitioner claims that attorneys fees are an inherent part of the relief sought and therefore must be determined before any judgment on the merits could be final and appealable. Petitioner cites as authority the decisions in a minority of circuit courts which have adopted a situational approach to a determination of the finality of judgments. Petitioner cannot demonstrate, however, that the application of the situational approach utilized by those courts would make for a different result than the one rendered by the Tenth Circuit.

The situational approach requires a de facto, case by case analysis of the nature of the attorneys fees involved in the underlying action. The minority view divides cases involving attorneys fees into two categories. In the first category, attorneys fees are similar to costs and therefore collateral to the action. In those cases, a lack of determination as to the amount of attorneys fees does not preclude the issuance of a final appealable judgment on the merits. The second category includes those cases where the attorneys fees are an integral part of the merits of the case and the scope of relief and cannot be characterized as costs. Only in the latter situation is the determination of attorneys fees a necessary part of a final, appealable judgment. *Holmes v. J. Ray McDermott and*

Company, 682 F.2d 1143 (5th Cir. 1982), *cert. denied* 459 U.S. 1107 (1983); *McQurter v. Atlanta,* 724 F.2d 881 (11th Cir. 1984) *Alcorn County v. U.S. Interstate Supplies, Inc.,* 731 F.2d 1160 (5th Cir., 1984).

Applying the criteria utilized by the courts under the situational approach, the attorneys fees in this action are collateral to the judgment, and do not toll the time for filing an appeal. Petitioner claims attorneys fees in this action under the Colorado wage claim statute which provides,

> Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by §§ 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action. (C.R.S. § 8-4-114 (1986 Cumulative Supplement)).

The issue of attorneys fees was first raised in the Bill of Costs filed by the petitioner subsequent to the judgment. Attorneys fees had never been raised in the pleadings, at or before the trial, and were never denominated as an element of damages. The Motion for and Memorandum in Support of Attorneys Fees characterized the petitioner's request for attorneys fees as costs. The extensive analysis of the Fifth Circuit in *Holmes, supra,* makes it clear that even in the minority view, statutory attorneys fees which are similar to costs, which are not an element of damages and which are collateral to the action do not toll the running of the time frame applicable to an appeal of a judgment on the merits. *Holmes, supra,* 682 F.2d 1143 at 1146. See also *Knighton v. Watkins,* 616 F.2d 795 (1980); *Alcorn County v. U.S. Interstate Supplies Inc., supra,* 731 F.2d at 1164. ("If the county had failed to request attorneys fees in its complaint, that would suggest that they were not integral to

the merits of this case".) *F. H. Krear and Company v. Nineteen Named Trustees,* 776 F.2d 1563 (2nd Cir. 1985) (Contractually stipulated attorneys fees are distinguishable from awards of attorneys fees pursuant to statute.)

The attorneys fees claimed under the wage claim statute are labeled as costs, taxed as costs, first requested in a bill of costs, and were never characterized as part of the judgment on the merits. Under such circumstances, the decision of the Tenth Circuit does not conflict with the situational approach. Even under the method advocated by petitioner, the attorneys fees entitlement herein would clearly fall within the category of costs and have been considered collateral to a judgment on the merits. The petitioner has thus failed to demonstrate grounds upon which certiorari should be granted.

III. COLORADO DOES NOT MANDATE A JOINT APPEAL OF THE MERITS AND OF ATTORNEY'S FEES.

The Colorado cases cited by petitioner do not support the proposition that the attorneys fees under consideration herein are part of the judgment under Colorado law. None of the cases cited by petitioner involve consideration of the Colorado wage claim statute or any other statute where attorneys fees are specifically addressed and directed to be taxed as costs. *Marietta v. Busto,* 691 P.2d 345, (Colo. App. 1984), *cert. denied,* 105 S.Ct. 2024 (1985), is a trade secrets case where, the trial court specifically reserved the issue of recoverability of attorneys fees for a later determination. Under those circumstances, the trial court retained jurisdiction to consider post-trial motions and no final judgment entered. *Ortega v. Board of County Commissioners,* 657 P.2d 989 (Colo. App. 1982) did not address the collateral nature of attorneys fees. In a one-paragraph opinion, the state appellate court found only that the appeal had not been perfected when the only issue raised by the cross-appellant was attorneys fees and no order regarding attorneys

fees had yet been entered by the trial court. In *Ball Corporation v. Loran,* 596 P.2d 412 (Colo. App. 1979), the appellate court rejected an attempt to certify the question of liability in a bifurcated proceeding where damages had not yet been determined, finding the requisites of Colorado Rule of Civil Procedure 54(b) had not been met. Attorneys fees are not addressed.

CONCLUSION

The Petition for Certiorari should be denied. Petitioner has failed to demonstrate that the Tenth Circuit Court of Appeals has rendered a decision in the instant case that would be in conflict with a decision of any federal court of appeals under the circumstances and facts of this case. Any question of the collateral nature of attorneys fees to be taxed as costs in an action has been previously determined by this court in its decision in *White v. New Hampshire, supra,* 455 U.S. 445 (1982). Considering that no grounds exist under Supreme Court Rule 17.1 to grant certiorari, the respondent herein prays that the Petition for Certiorari be denied.

Respectfully submitted,

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III

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APPENDIX I.A

PER CURIAM OPINION ENTERED DECEMBER 12, 1986
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

BECTON DICKINSON AND COMPANY,
a foreign corporation,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 82-F-462)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

William S. Finger of Nicholls, Kusic, Frank & Finger, Evergreen, Colorado, for Plaintiff-Appellant.

Terre Lee Rushton of Kelly, Haglund, Garnsey & Kahn, Denver, Colorado, for Defendant-Appellee.

Before McKAY, SETH, and TACHA, Circuit Judges.

PER CURIAM.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a). this appeal came on for consideration on the briefs and record on appeal.

This action arises out of an employment contract under which plaintiff served as defendant's western regional manager for a salary plus commission on sales. Prior to plaintiff's completion of a major sale to the United States Air Force, defendant's commission structure was modified, resulting in a substantial reduction in the commission ultimately paid to plaintiff. Although he protested, plaintiff continued his employment with defendant. Sometime later, and shortly before an order for spare parts and a supplemental purchase order were placed by the Air Force, defendant terminated plaintiff's employment.

Plaintiff initially brought this diversity action asserting claims for breach of contract, quantum meruit, misrepresentation, and outrageous conduct. Following a lengthy procedural course, during which plaintiff's claims were revised somewhat as a result of the district court's grant of partial summary judgment for defendant, the case was tried to a jury, which found for defendant on plaintiff's misrepresentation and implied contract (for commission on the spare parts order) claims but awarded plaintiff $5,000 on an implied contract theory regarding the supplemental purchase order.

The district court entered judgment on the verdict on March 26, 1984. Plaintiff timely filed an original and an amended new trial motion challenging various substantive rulings by the district court, as well as a motion for attorney's fees. On May 16, 1984, the new trial motions were disposed of, but the district court reserved determination of the amount of attorney's fees to be awarded to plaintiff. The district court ultimately issued its final order regarding the fees issue on August 2, 1984, and plaintiff filed his sole notice of appeal from the court's post-trial orders on August 29, 1984.

Defendant has moved for summary dismissal of this appeal as untimely, relying on the principle we first announced in Cox v. Flood, 683 F.2d 330 (10th Cir. 1982). In Cox and several later cases, this court held that judgments finally disposing of the merits are appealable even though questions relating to attorney's fees have been left undecided. *Id.* at 331; *see, e.g.*, Art Janpol Volkswagen v. Fiat Motors, 767 F.2d 690 (10th Cir. 1985); *cf.* Dataq, Inc. v. Tokheim Corp., 736 F.2d 601 (10th Cir. 1984). Accordingly, an appeal on the merits must be filed within the requisite time period following entry of final judgment thereon, notwithstanding that a motion for attorney's fees may be pending. *See* West v. Keve, 721 F.2d 91 (3d Cir. 1983); Smillie v. Park Chemical Co., 710 F.2d 271 (6th Cir. 1983). Since plaintiff did not file a notice of appeal from the district court's May 16, 1984, order disposing of his new trial motions until August 29, 1984, when he appealed the district court's award of $1,000 in attorney's fees, defendant contends that the former appeal must be dismissed as untimely.

Plaintiff seeks to avoid the effect of the authorities cited by arguing that, unlike our previous decisions, the present case involves a situation where attorney's fees are an inherent part of the relief sought and, consequently, must be determined before the judgment on the merits can be considered final. While there is some authority for the type of suitational approach advocated by plaintiff, *see* F. H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563 (2d Cir. 1985); McQurter v. Atlanta, 724 F.2d 881 (11th Cir. 1984); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983), we believe the better course is followed in those circuits which treat all attorney's fees motions as procedural equivalents and uniformly require separate notices of appeal when such motions are resolved after judgment has been rendered on the merits. *See* Exchange National Bank v. Daniels, 763 F.2d 286 (7th Cir. 1985); Morgan v. Union Metal

Manufacturing, 757 F.2d 792 (6th Cir. 1985); International Association of Bridge, etc., Local Union 75 v. Madison Industries, Inc., 733 F.2d 656 (9th Cir. 1984); West v. Keve, *supra*.

A uniform, unqualified rule is especially appropriate in the present context for several reasons. First, the de facto, case-by-case analysis required by the situational approach, and the consequent uncertainty it would promote until an inclusive and coherent set of principles could be worked out, is particulary unsuited to a jurisdictional rule that requires forfeiture of an appeal for noncompliance. *See Daniels, supra* at 293; 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3915 at 398-401 (Supp. 1985); *see also* Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1165 n.4 (5th Cir. 1984) (Fifth Circuit acknowledging the difficulties its situational approach may cause litigants). Second, to be consistent, those courts holding that under particular circumstances fees are an integral part of the judgment, which is therefore not final until the matter of fees is resolved, must also hold that motions relating to such fees are, in effect, motions to alter or amend judgment and thus subject to the time constraints of Fed. R. Civ. P. 59(e). This result, however, cannot be endorsed in light of the Supreme Court's analysis and decision in White v. New Hampshire, 455 U.S. 445 (1982) (holding Rule 59(e) inapplicable to requests for fees under 42 U.S.C. § 1988). Of course, the *White* holding specifically applies only to §1988 requests, but nothing in the opinion indicates that motions seeking fees pursuant to other authority should be treated any differently. *See id.* at 450-55. Third, divining the degree of relationship between attorney's fees and the compensation sought in any particular case is a procedure of uncertain design and questionable validity. The Third Circuit has expressed this concern in more specific terms:

> We reject as altogether too metaphysical the distinction between fees that are "compensation for injury" and those that are not. All awards of fees make the prevailing party better off. Whether this benefit is "really" a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely and leaving the prevailing party with a greater net award, is a question of semantics rather than substance. Resolution of this question would depend on the legislative (or bargaining) history of a given statute or contract — if indeed such a question ever has a sensible answer.

Daniels, supra at 294. Finally, we note that the adoption of a per se rather than situational approach is certainly consistent with, if not compelled by, this court's unqualified holdings in prior decisions. *See, e.g., Cox supra* at 331 ("judgments finally disposing of the merits are appealable even though questions relating to attorney's fees have been left undecided"); Clulow v. Oklahoma, 700 F.2d 1291, 1293 n.1 (10th Cir. 1983) ("outstanding motions for fee awards are no longer to be considered as affecting the finality and appealability of decisions on the merits").

Plaintiff also argues that, since this is a diversity action, the rule of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), precludes the application of the principles developed by this court in *Cox* and subsequent cases. In plaintiff's view, the law of Colorado, the forum state, which apparently would permit joint appeal of the merits and attorney's fees determinations under the present circumstances, *see* Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), *cert. denied,* 105 S. Ct. 2024 (1985), must be applied. We disagree. State law governs only

those issues that are properly characterized as substantive; matters of procedure are controlled by federal law. Hanna v. Plumer, 380 U.S. 460 (1965); Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982). The specification of the time for filing a notice of appeal from the judgment of a federal district court is clearly a question of federal procedure and as such is governed by federal law. *See generally Art Janpol Volkswagen, supra,* and *Daniels, supra* (both cases applying federal law to the issue presently under consideration, without acknowledgment of any *Erie* problem). Diversity cases decided by courts following the situational approach, such as Certain British Underwriters v. Jet Charter Service, Inc., 739 F.2d 534, 535-36 (11th Cir. 1984) and Oxford Production Credit Association v. Duckworth, 689 F.2d 587, 588-89 (5th Cir. 1982), which hold the *underlying* determination of the relationship of fees to the merits to be a matter of state law, are not necessarily inconsistent with the result reached here. Indeed, these decisions do apply federal law — *i.e.*, the situational approach developed by the particular circuit — to the ultimate issue of appellate jurisdiction.

For the reasons discussed above, we hold that the principle first enunciated in *Cox* applies in diversity as well as federal question cases regardless of the perceived relationship between the fee award and the determination of the underlying controversy. Furthermore, we find plaintiff's plea for nonretroactive application of our decision to be entirely out of place. While this court has not yet expressly ruled on the issues raised by plaintiff's proposed exception to *Cox*, not one of our post-*Cox* decisions even suggests that the situational approach advocated by plaintiff might be adopted or that diversity cases would somehow warrant special treatment. We are neither overruling clear past precedent nor deciding an issue of first impression whose resolution was not clearly foreshadowed. *See* EEOC v. Gaddis, 733 F.2d 1373, 1376 (10th Cir. 1984). If

nonretroactivity were required under these circumstances, virtually every appellant with enough intellectual ingenuity to state his position in terms of an as yet unconsidered exception to an existing rule would be able to side-step the "new principle of law" hurdle imposed in *Gaddis*.

Accordingly, plaintiff's attempted appeal from the district court's judgment on the merits must be dismissed. The notice of appeal, filed more than thirty days after the denial of plaintiff's motions for new trial, was untimely and ineffective. Fed. R. App. P. 4(a)(1) and (4).

Defendant has also moved to dismiss this appeal as it relates to the district court's order of August 2, 1984, which finally resolved the issue of attorney's fees. Defendant contends that plaintiff's notice of appeal, filed after said order but before the fees were taxed as costs in accordance with the court's direction, was premature. This argument is without merit. The taxation of costs is a ministerial function, and, as such, its completion is not a prerequisite to the finality of the district court's underlying order regarding fees. *See* United States v. 2, 186.63 Acres of Land, 464 F.2d 676, 678 (10th Cir. 1972).

Without a single reference to any supporting authority, plaintiff asserts that the district court's award of fees is contrary to existing standards and inadequately vague. We cannot agree. Indeed, in light of the thorough analysis evident in the district court's orders addressing the matter, and the unsupported, perfunctory objections raised by plaintiff on appeal, very little need be said about the fee award. The determination of a reasonable fee under Colo. Rev. Stat. § 8-4-114 is a question of fact for the trial court and should not be disturbed on review unless patently erroneous and unsupported by the evidence. Hartman v. Freedman, 591 P.2d 1318, 1322 (Colo. 1979). Plaintiff has failed to demonstrate such error here.

The motion for summary disposition is GRANTED and the appeal DISMISSED as to all issues except the award of

attorney's fees. The judgment of the United States District Court for the District of Colorado awarding attorney's fees to plaintiff in the amount of $1,000 is AFFIRMED. Plaintiff's request for additional briefing is inappropriate and, in light of the disposition of this appeal, moot. The mandate shall issue forthwith.

APPENDIX I.B

DENIAL OF MOTION FOR RECONSIDERATION REVIEWED AS A MOTION FOR RECALL ENTERED MARCH 26, 1987 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JANUARY TERM — March 26, 1987

Before Honorable Monroe G. McKay, Honorable Oliver Seth, and Honorable Deanell Reece Tacha, Circuit Judges, United States Court of Appeals

JOSEPH G. BUDINICH,

Plaintiff-Appellant,

v.

No. 84-2192

BECTON DICKINSON AND COMPANY,
a foreign corporation,

Defendant-Appellee.

This matter comes on for consideration of plaintiff's petition for rehearing, which we construe as a motion to recall the mandate.

Upon consideration thereof, the motion is denied.

/s/ ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk

APPENDIX II.A

ORDER OF MAY 31, 1983 GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Chief Judge Sherman G. Finesilver:

THIS MATTER is before the Court on Plaintiff's Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. Plaintiff seeks summary judgment only as to his First Claim for Relief while Defendant seeks summary judgment on all claims in Plaintiff's Complaint. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332, diversity of citizenship.

The parties have been given the opportunity to thoroughly brief all issues presented by the two motions. Upon careful consideration of those briefs, the evidence presented, and the applicable law, we are of the view that Plaintiff's Motion for Partial Summary Judgment should be DENIED and that Defendant's Motion for Summary Judgment should be GRANTED IN PART and DENIED IN PART. Because of

the imminence of the trial in this case, and therefore the necessity for a speedy resolution of these motions, the Court will not set forth a detailed review of either the facts or the law which support this Order. The Court reserves the right to do so at a later date.

The disputes in this case arise out of the parties' employment relationship. Plaintiff was employed by Defendant in either late 1978 or early 1979 as the Western Regional Sales Manager for Defendant. He was employed in that capacity until his termination on November 30, 1981. Part of Plaintiff's compensation as a regional sales manager was a commission on sales of Defendant's products within his region. Prior to October 1979, Defendant utilized a commission schedule which paid 2% on total net sales from base to quota and 4% on total net sales exceeding annual quota. Defendant modified its commission schedule at its quarterly national sales meeting in October, 1979. The revised commission schedule provided for a $10,000 ceiling on a commission earned on any one sale.

The immediate controversy arose with the completion of a large contract with the United States Air Force for the purchase of 157 portable vapor dectors ("PVD's") manufactured by Defendant. With the signing of the definitive award/contract on August 6, 1981, Plaintiff was paid a commission on the sale of $10,000. On November 3, 1981, Plaintiff wrote a letter to Defendant demanding payment of a commission pursuant to the original commission schedule in effect prior to October, 1979. Plaintiff was terminated on November 30, 1981. Subsequent to his termination, Defendant entered into a separate contract with the Air Force for the purchase of an additional 77 PVD's and modified the original contract to include spare parts and accessories. Plaintiff brought this suit for breach of his employment contract, *quantum meruit*, false representation, wrongful discharge, and outrageous conduct.

Plaintiff seeks additional compensation on the August 6, 1981 contract pursuant to the original commission schedule and the payment of a commission on both the subsequent contract with the Air Force and the modification of the first contract.

Summary judgment is appropriate only where the pleadings, affidavits, depositions, admissions, or other evidence submitted demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See eg. Cayce* v. *Carter Oil Company*, 618 F.2d 669 (10th Cir. 1980); *Webbe* v. *McGhie Land Title Company*, 549 F.2d 1358 (10th Cir. 1977); Rule 56, Federal Rules of Civil Procedure. Where different inferences can be drawn from the same evidence, or where questions of credibility are present, summary judgment is not appropriate. *Norton* v. *Liddel*, 620 F.2d 1375 (10th Cir. 1980); *Eagle* v. *Louisiana Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972).

In his First Claim for Relief, Plaintiff alleges that Defendant willfully and intentionally breached the provisions of the employment contract with Plaintiff by unilaterally modifying the commission schedule. Both parties have moved for summary judgment on this claim. The law in Colorado[1] is that in the absence of "special consideration or an express stipulation as to the duration of employment, an indefinite general hiring is terminable at will by either party." *Lampe* v. *Presbyterian Medical Center*, 590 P.2d 513, 514 (Colo. App. 1978). The parties are in agreement that the terms and conditions of Plaintiff's employment are set out in several letters exchanged by Plaintiff and Defendant in October, 1978. There is nothing in either letter that could reasonably be interpreted to construe Plaintiff's employment as being other than one terminable at will.

1. Because Plaintiff's employment with Defendant was centered in the State of Colorado, and because Colorado has an overriding interest in protecting its citizens in their employment, we find that the law of Colorado rather than that of either New York or New Jersey applies in this case.

An employment contract that is terminable at will is also modifiable at will; a modification having the effect of terminating the existing contract and substituting in its place a new contract with the modified terms. *Gebhard* v. *Royce Aluminum Corporation*, 296 F.2d 17 (1st Cir. 1961); *Bartinikas* v. *Clarklift of Chicago North, Inc.*, 508 F. Supp. 959 (N.D. Ill. 1981). Thus, Defendant's modification of its commission schedule in October, 1979, was not a breach of Plaintiff's employment contract. Additionally, it is undisputed that Plaintiff continued to work for Defendant as its Western Regional Sales Manager more than twenty-five months *after* the commission schedule was modified. During that period he accepted his full salary and commission based on the modified schedule. While Plaintiff voiced his disapproval of the modified schedule prior to its adoption, there is no evidence whatsoever to indicate that he ever objected to the schedule once adopted or refused to accept commissions earned under the new schedule. Such conduct constitutes acceptance of the modified contract as a matter of law. *See Gebhard* v. *Royce Aluminum Corporation*, *supra.*, at 19. Thus, Plaintiff's Motion for Partial Summary Judgment is DENIED and Defendant's Motion for Summary Judgment, as to Plaintiff's First Claim for Relief, is GRANTED.

Having found the existence of an express employment contract during the entire term of Plaintiff's employment with Defendant, summary judgment must also be granted with respect to Plaintiff's Second Claim for Relief, but only to the extent that Plaintiff claims additional commission from the August 6, 1981 contract. While breach of contract and *quantum meruit* may be plead as alternative theories of recovery, once an express contract providing for a fixed commission is established, Plaintiff is not entitled to recover on a *quantum meruit*. *See eg. Jensen* v. *Neal*, 124 P. 471 (Colo. 1912); *Reitler* v. *Olson*, 187 P. 313 (Colo. 1919); *cf. Palmer* v. Gleason, 389 P.2d 90 (Colo. 1964).

The Court does not, however grant summary judgment on Plaintiff's Second Claim for Relief as it relates to any commission which may or may not be due Plaintiff on the two contracts completed subsequent to his termination. The Colorado courts have made it clear that there is a distinction between the time when a commission is *earned* and when it is *due and payable. Weick* v. *Rickenbaugh Cadillac Company,* 303 P.2d 685, 687 (Colo. 1956). In the instant case, it is not clear from any of the letters evidencing Plaintiff's employment when a commission is *earned.* The affidavits submitted, and the other evidence, demonstrate a genuine issue of material fact on this point. Arguably, if Plaintiff can establish that a commission is *earned* some time prior to the actual execution of the contract documents in the two subsequent sales to the Air Force, then he would be entitled to recover the reasonable value of his services on those two sales. Thus, summary judgment is inappropriate on this issue.

In his Third Claim for Relief, Plaintiff asserts fraudulent misrepresentation and/or concealment regarding Defendant's commission schedules and the ability of defendant to modify said schedules without his consent. We find that Plaintiff has demonstrated sufficient material issues of fact in dispute with respect to Defendant's representations and intent to withstand Summary Judgment on these claims. Defendant's Motion for Summary Judgment on Plaintiff's Third Claim for Relief is DENIED.

Finally, Plaintiff alleges that he was terminated in order to deprive him of further commissions on subsequent sales of PVD's to the Air Force. He asserts that such conduct constitutes a wrongful discharge in violation of Colorado law. He also alleges that such conduct is outrageous as that tort has developed in Colorado. Taking the facts, as we must, in the light most favorable to Plaintiff, we nonetheless conclude that summary judgment is appropriate on Plaintiff's Fourth Claim for Relief. We do not agree with Plaintiff that Colorado has

adopted or even evinced an intent to adopt a "public policy" exception to the terminable at will doctrine. Even if such were the case, Plaintiff can point to no specific legislatively recognized policy which would protect him in this case. *See Lampe* v. *Presbyterian Medical Center, supra.* [where the Court of Appeals refused to hold for the plaintiff in spite of the existence of a "broad general statement of policy contained in a statute."] The fact remains that Plaintiff's employment was terminable at will, without cause. Plaintiff has not stated a cause of action for wrongful termination.

While the question whether Defendant has engaged in extreme and outrageous conduct is often a question of fact for the jury, the Court must make the threshold determination of whether reasonable persons could differ on the question. *See Rawson* v. *Sears Roebuck & Company,* 530 F. Supp. 766, 780 (D. Colo. 1982); *Vigoda* v. *Denver Urban Renewal Authority,* 624 P.2d 895, 898 (Colo. App. 1980). Taking the facts in the light most favorable to Plaintiff, we conclude that Defendant's conduct did not approach that level of conduct properly characterized as "outrageous." *Compare with Rugg* v. *McCarty,* 476 P.2d 753 (Colo. 1970); *Meiter* v. *Cavanaugh,* 580 P.2d 399 (Colo. App. 1978). Defendant is entitled to summary judgment on Plaintiff's Fourth Claim for Relief.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Plaintiff's First and Fourth Claims for Relief are dismissed *in toto.* Plaintiff's Second Claim for Relief

is dismissed only as it relates to a claim for additional commission on the August 6, 1981 sale. In all other respects, the Motion is denied.

DATED at Denver, Colorado this 31st day of May, 1983.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX II.B

JUDGMENT OF MARCH 26, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462
JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

JUDGMENT

THIS CAUSE having come on regularly for trial before the Court, The Honorable Sherman G. Finesilver, District Judge presiding, and a jury having been duly impanelled and sworn to try the issues herein and the trial having proceeded to conclusion and having been duly submitted to the jury and the jury having subsequently rendered its verdict. It is

ORDERED that judgment is entered in favor of the plaintiff and against the defendant on plaintiff's claim for implied contract as to the contract for the sale of 79 additional PVD units, in the amount of $5,000.00, together with interest at the rate of 10.60% from the date of entry of this judgment. It is

FURTHER ORDERED that judgment is entered in favor of the defendant and against the plaintiff on plaintiff's claims of fraudulent concealment, misrepresentation and claim for implied contract as to the contract for the sale of spare parts and accessories and those claims are hereby dismissed.

DATED at Denver, Colorado this 26th day of March, 1984.

FOR THE COURT:

/s/ JAMES R. MANSPEAKER

JAMES R. MANSPEAKER,
Clerk
United States District Court

APPENDIX II.C

ORDER OF MAY 14, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON AND COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

IN THIS ACTION, Plaintiff originally sought recovery of compensatory and punitive damages, as well as costs and interest, on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent concealment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment. The Court dismissed Plaintiff's claims for breach of contract and wrongful termination, and dismissed, in part, Plaintiff's claim for quantum meruit, to the extent that said claim sought additional commissions on a sale which took place on August 6, 1983. A trial on this matter was held commencing June 6, 1983. Said trial resulted in mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his

claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00.

This matter is before the Court on the following motions: (1) Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984; (2) Amended Motion For a New Trial, Amendment Of Judgment, Relief From Judgement Or Order, filed by Plaintiff on April 6, 1984; (3) Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984; (4) Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984; and (5) Motion To Review Taxation Of Costs, filed by Defendant on April 16, 1984.

The Court has thoroughly reviewed the briefs, statements and affidavits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds as follows: (1) The Motion For New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, should be DENIED: (2) The Amended Motion For A New Trial, Amendment Of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 6, 1984, should be DENIED IN PART AND GRANTED IN PART; (3) The Motion For Attorney's Fees, filed by Plaintiff on April 2, 1984, will be GRANTED to the extent that the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees; and (4) The Motion To Review Taxation Of Costs, filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be HELD IN ABEYANCE pending a determination of the amount of attorney's fees to be awarded in this case.

Plaintiff's Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order lists numerous

grounds upon which Plaintiff maintains that he is entitled to a new trial or an altered or amended judgment. Each of these grounds were considered and rejected by the Court prior to the trial or during the course of the trial on this matter. Plaintiff's motion does not provide the Court with any additional information or basis upon which we should alter our earlier rulings. Although the Court has again thoroughly reviewed the grounds asserted by the Plaintiff, the Court again finds that such grounds are individually and collectively without merit. Accordingly, the Court finds that Plaintiff's motion should be *DENIED.*

Plaintiff's Amended Motion For New Trial, Amendment Of Judgment, And Relief From Judgment Or Order ("Plaintiff's Amended Motion") raises, for the first time, a claim for prejudgment interest on the $5,000.00 Judgment entered in his proceeding. Plaintiff asserts that he is entitled to prejudgment interest pursuant to C.R.S. § 5-12-102, from February, 1982, the time at which Defendant booked the order for 79 PVD units which formed the basis of the $5,000.00 Judgment in this case. Although Defendant maintains that Plaintiff is not entitled to prejudgment interest in this case, Defendant does not contest that the prejudgment interest, if awarded, should be calculated from February, 1982 until the date Judgment entered in this case.

C.R.S. § 5-12-102(1) provides a statutory basis for prejudgment interest when money or property has been wrongfully withheld:

> Except as provided in section 13-21-101, C.R.S., when there is no agreement as to the rate thereof, creditors *shall* receive interest as follows: (a) When money or property has been wrongfully withheld, interest *shall* be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date

> judgment is entered, whichever first occurs; or, at the election of the claimant, . . .
> (b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys . . . after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs. (Emphasis added).

The mandatory language of C.R.S. § 5-12-102(1) clearly indicates that prejudgment interest is recoverable under this statute as a matter of right where a Plaintiff falls within the requirements of the statute. *See e.g., Hayes* v. *North Table Mountain Corp.*, 608 P.2d 830 (Colo. Ct. App. 1980). Furthermore, C.R.S. § 5-12-102(3) provides that "Interest shall be allowed as provided in [C.R.S. § 5-12-102(1)] even if the amount is unliquidated at the time of wrongful withholding or at the time when due." *See also Jasken* v. *Sheehy Constr. Co.*, 642 P.2d 58 (Colo. Ct. App. 1982).

Defendant maintains, in part, that Plaintiff is not entitled to an award of prejudgment interest because Plaintiff's Amended Motion was not filed in a timely manner. Plaintiff responds that the Amended Motion was filed in a timely manner pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. The Court is of the view that Plaintiff's request for prejudgment interest is untimely if considered as a motion pursuant to Rule 59(b) and 59(e) of the Federal Rules of Civil Procedure. The Court finds, however, that Plaintiff's request is timely and appropriate when considered as a motion for the correction of a clerical error under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 59 of the Federal Rules of Civil Procedure provides that a motion for a new trial and a motion for amendment of judgment must be served not later than 10 days after entry of judgment. In addition, Rule 6(b) of the Federal Rules of Civil

Procedure expressly states that this time period may not be enlarged by the Court. *See* 6A *Moore's Federal Practice* ¶59.09[1] (and the cases cited therein).

In the instant case, as noted above, Judgment entered on March 26, 1984. Plaintiff filed and served his Amended Motion on April 6, 1984, eleven days after entry of Judgment. Therefore, Plaintiff's motion was not filed in a timely manner as required by Rule 59 of the Federal Rules of Civil Procedure.

We are not persuaded by Plaintiff's argument that the ten day period was extended by three days pursuant to Rule 6(e) of the Federal Rules of Civil Procedure. Rule 6(e) provides for an extension of time for actions which must be taken within a prescribed period after the service of a notice or other paper when such service is effected by mail. Rule 6(e), F.R.Civ.P. The time for filing a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure is not enlarged by Rule 6(e) because the ten day period in which they must be filed runs from entry of judgment rather than from receipt of notice. *See Flint v. Howard*, 464 F.2d 1084 (1st Cir. 1972); Wright & Miller, *Federal Practice and Procedure* § 1171; 2 *Moore's Federal Practice* ¶6.12. *See also Reynolds v. Hunt Oil Co.*, 643 F.2d 1042 (5th Cir. 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenback*, 525 F.2d 1179 (8th Cir. 1975). We find particularly persuasive on this point the reasoning articulated by the First Circuit Court of Appeals in *Flint v. Howard, supra:*

> A second alleged ground for rehearing is a plea to add the three-day grace period described in Rule 6(e), Fed.R.Civ.P., to the time allowed for filing a Rule 52 or 59 motion. The problem with this argument is that Rules 52 and 59 both provide that the 10 days within which a motion for reconsideration must be filed begins to run from "entry of judgment" rather than from receipt of notice and Rule 6(b), Fed.R.Civ.P., prohibits enlargement of

> such time. Petitioner's ingenious and undocumented effort to justify an additional three-day mailing period does not persuade us.

Flint v. Howard, 464 F.2d at 1086. Accordingly we find that Plaintiff's Amended Motion should be *DENIED* to the extent that it seeks to assert a claim under Rule 59 of the Federal Rules of Civil Procedure.

Although the issue was not raised, as such, by the Plaintiff, the Court is of the view that Plaintiff's request for prejudgment interest should be considered as a timely request under Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 60(a) provides, in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60(a), Fed.R.Civ.P. Motions filed under Rule 60(a) are clearly not restricted by the ten day rule established by Rule 59 of the Federal Rules of Civil Procedure.

Where a prevailing party has an unconditional statutory right to prejudgment interest on an award, the failure to include the interest in the judgment is a "clerical mistake" that can be corrected under Rule 60(a). *See Hayden v. Scott Aviation, Inc.*, 684 F.2d 270 (3rd Cir. 1982); *Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3rd Cir. 1972); *Gilroy v. Erie-Lachawann R.R.*, 44 F.R.D. 3, 4 (S.D.N.Y.); *In re Merry Queen Transfer Corp.*, 266 F. Supp. 605, 607 (E.D.N.Y. 1967) *modified in other respects sub nom., O'Rourke v. Queen Transfer Corp.*, 370 F.2d 781 (2nd Cir. 1967); Wright & Miller, *Federal Practice and Procedure* § 2854. *Cf. Goodman v. Heublein*, 682 F.2d 44 (2nd Cir. 1982) (Court acknowledged that where state substantive law provided right to prejudgment interest, failure to provide such interest could be characterized as clerical error

under Rule 60(a); however, rule was inapplicable where award of prejudgment interest under ADEA was governed by federal, not state, law). *But see Chicago & N.W.Ry.Co. v. Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976). On the other hand, if granting prejudgment interest is within the discretion of the court, the judgment must be amended pursuant to Rule 59 of the Federal Rules of Civil Procedure. *See Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983), *cert. denied* 104 S.Ct. 487 (1984); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir. 1980).

In the instant case, as noted above, the Court is of the view that prejudgment interest is available to the Plaintiff as a matter of right pursuant to C.R.S. § 5-12-102(1). Accordingly, the Court finds that Plaintiff's request for prejudgment interest can be considered a timely request pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

Defendant maintains that Plaintiff's request for prejudgment interest, even if timely, should be denied because Plaintiff did not raise or address this issue at or before the trial in this case. The Court finds this argument to be without merit. The Court initially notes than Plaintiff's Complaint contained a request for an award of interest. Furthermore, courts have consistently held that a plaintiff's failure to pursue his request for prejudgment interest during the trial, or even to demand such interest in his complaint, does not amount to a waiver of his right to interest. *See Mallis v. Bankers Trust Co.*, 717 F.2d 683 (2nd Cir. 1983) (and cases cited therein). Accordingly, the Court finds that Plaintiff has not waived his claim for prejudgment interest in the instant case.

Defendant's final objection to Plaintiff's claim for prejudgment interest is that C.R.S. § 8-4-101 does not authorize prejudgment interest in the instant case. The Court acknowledges that C.R.S. § 8-4-101 does not authorize an award of

prejudgment interest in this case; however, the basis for such an award, as noted above, is C.R.S. § 5-12-102. C.R.S. § 8-4-101, *et seq.*, is relevent to this discussion, if at all, as a means for determining the time from which the interest in question should be calculated. As noted above, in *Hayes v. North Table Mt. Corp., supra*, the Colorado Court of Appeals held that interest on a brokerage commission, awarded pursuant to C.R.S. §5-12-102, was due on the commission from the date that the commission was due and payable. C.R.S. § 8-4-104 lends additional support to this conclusion. The Colorado Court of Appeals, in interpreting C.R.S. § 8-4-104(2), has concluded that commissions not fully earned at the time of termination need not be paid under this provision at the time of termination; however, such wages become immediately due at the time they were fully earned. *See Hofer v. Polly Little Realtors, Inc.*, 37 Colo. App. 86, 543 P.2d 114 (1975). Accordingly, the Court finds that Plaintiff is entitled to an award of prejudgment interest on the $5,000.00 commission which formed the basis of the jury verdict in this case from the date that the commission was due and payable.

Plaintiff maintains that this right to prejudgment interest commenced in February, 1982, at the time the Defendant booked the 79 PVD order for $600,013.00. Defendant does not contest Plaintiff's assertion that prejudgment interest, if it is to be awarded in this case, should be calculated from February, 1982. Furthermore, the Court notes that the pretrial order in this case lists, as an "uncontroverted fact," that "a formal written contract was executed in January, 1982 regarding the $600,013.00 purchase of additional PVD units." Therefore, the Court finds that Plaintiff is entitled to an award of prejudgment interest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually.

In his motion for attorney's fees, Plaintiff maintains that he is entitled to an award of reasonable attorney's fees pursuant to C.R.S. § 8-4-114.

C.R.S. § 8-4-114 provides:

> Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

The Colorado Court of Appeals has explained that recovery of attorney's fees under C.R.S. § 8-4-114 is a matter of right, and only the amount of such a recovery is within the discretion of the trial court:

> Section 114, in providing that the judgment "shall include a reasonable attorney fee in favor of the winning party," leaves nothing to the discretion of the trial court except to determine what is a "reasonable fee."

Keeton v. Rike, 559 P.2d 262, 263 (Colo. Ct. App. 1977). *See also Hofer v. Polly Little Realtors, supra.*

The Court is of the view that the $5,000.00 judgment in this case is based on a claim for wages within the meaning of C.R.S. § 8-4-104, 8-4-105. Commissions are clearly within the definition of "wages" for purposes of these provisions. *See* C.R.S. § 8-4-101(9); *Hofer v. Polly Little Realtors, Inc., supra.* Therefore, the Court finds that Plaintiff is entitled to an award of reasonable attorneys fees with respect to the recovery of said wages pursuant to C.R.S. § 8-4-114.

The Court rejects Defendant's argument that attorney's fees are not recoverable under C.R.S. § 8-4-114 for a claim based on quantum meruit. C.R.S. § 8-4-114, in defining "wages or compensation" for purposes of these provisions,

specifies that the terms include amounts owed ". . . whether the labor or service is performed under contract, subcontract, partnership, subpartnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment." Furthermore, C.R.S. § 8-4-104 provides, in pertinent part, that wages or compensation become due and payable ". . . when an employee not having a written contract for a definite period quits or resigns his employment." These provisions clearly suggest that C.R.S. § 8-4-104, 8-4-105 and 8-4-114 are not limited to cases involving wages or compensation due pursuant to a written contract. Therefore, the Court finds that attorneys fees are recoverable under C.R.S. § 8-4-114 regardless of whether a plaintiff's claim is based on breach of contract or quantum meruit.

The Court also rejects Defendant's argument that C.R.S. § 8-4-104 conditions recovery of attorney's fees upon a determination of the employer's lack of a good-faith legal justification for the refusal to pay wages in a timely fashion. The provision to which the Defendant apparently refers, C.R.S. § 8-4-104(3) provides for a penalty to be added to the compensation legally proven to be due, in an amount equal to fifty percent thereof, if an employer refuses to pay wages or compensation without a good-faith legal justification for such refusal. However, an award of attorney's fees under C.R.S. § 8-4-114 is not dependent on an imposition of a penalty under C.R.S. § 8-4-104. *See Keeton v. Rike, supra, Hofer v. Polly Little Realtors, Inc., supra.* Accordingly, the lack of a finding in this case regarding Defendant's good-faith legal justification in refusing to pay the wages in question does not affect Plaintiff's claim for attorney's fees under C.R.S. § 8-4-114.

Defendant's final objection to Plaintiff's motion for attorney's fees is that Plaintiff has failed to file adequate records in support of his request as required by Rule 104 of our Local

Rules of Practice. The Court is of the view, however, that this goes to the reasonableness of the attorney's fees in question, as opposed to Plaintiff's right to such an award.

Accordingly, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees pursuant to C.R.S. § 8-4-114, with respect to the $5,000.00 judgment in the instant case.

As noted above, the reasonableness of an award of attorney's fees under C.R.S. § 8-4-114 is within the discretion of the trial court. In the instant case, we are of the view that the amount requested by Plaintiff, $52,198.00, would not be a reasonable award of attorney's fees pursuant to C.R.S. § 8-4-114.

Although Plaintiff was technically the "winning party" in this action, in that the jury awarded the Plaintiff $5,000.00 in damages, it is necessary to keep in mind that the Plaintiff recovered on only one of several claims that he originally filed in this case. As noted above, a portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. The Court is of the opinion that the "proportionate recovery rule," traditionally applied in cases involving claims for attorney's fees under 28 U.S.C. § 1988, must also be applied to claims for attorney's fees under C.R.S. § 8-4-114. In *Scheriff v. Beck*, 452 F.Supp 1254 (D.Colo. 1978), the Court explained:

> [W]e recognize the rule in the Tenth Circuit that "when a party has prevailed in a court action . . . he may be entitled to attorney's fees proportionate to the extent of his recovery." *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1153 (10th Cir. 1976). (citations omitted) . . . Applying the proportionate recovery rule plaintiff's fee request must again be reduced. Plaintiff was permitted to present three separate civil rights claims to the jury and recovered only on one. Any recovery granted should take into account this disparity.

Id. at 1259. *See also Keyes v. School Dist. No. 1*, 439 F.Supp. 393 (D.Colo. 1977); *Perkins v. New Orleans Athletic Club*, 429 F.Supp. 661 (E.D.La. 1976). Accordingly, we are of the view that Plaintiff is not entitled to recovery of all of the attorney's fees incurred.

The Court also notes that any attorney's fees awarded under C.R.S. § 8-4-114 are to be "taxed as part of the costs of the action." *See* C.R.S. § 8-4-114. In this case, as will be discussed below, the award of costs may be affected by the offer of judgment submitted by Defendant under Rule 68 of the Federal Rules of Civil Procedure. Accordingly, any award of attorney's fees may be significantly reduced as a result of Defendant's offer of judgment.

In light of these factors, as well as the factors outlines in *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981) and *Battle v. Anderson*, 614, F.2d 251 (10th Cir. 1980), the Court is of the opinion that the amount requested by the Plaintiff does not represent a "reasonable" amount of attorney's fees under C.R.S. § 8-4-114. As will be described below, Plaintiff will be permitted to submit the necessary documentation in order to support his claim for a reasonable award of attorney's fees in this case.

Both parties have moved this Court to review the taxation of costs by the Clerk of the Court. The amount of costs to be taxed in this case depends to a great extent, however, on the final resolution of Plaintiff's request for attorney's fees under C.R.S. § 8-4-114. Any attorneys fees awarded must be included in the costs taxed in this action. Furthermore, just as the offer of judgment in this case could reduce any award of attorney's fees, an award of attorney's fees could conceivably alter the role that the offer of judgment would normally play in the taxation of costs. Accordingly, the parties' motions to review taxation of casts will be HELD IN ABEYANCE pending a determination of a reasonable award of attorney's fees in this case.

The Court is of the view that the parties should be able to reach an agreement which would resolve the issues in this case which remain viable at this time. The Court is of the opinion that the interests of both parties would be well served if the parties could reach an agreement, in light of the factors cited above, as to a reasonable award of attorney's fees in this action. The added time, effort and expense which will be required to have this matter resolved by the Court, will most likely eliminate any benefit that either party could hope to receive from an award of costs or attorney's fees in this action. Accordingly, the parties are *DIRECTED* to make every effort to resolve this matter. The Court is to be advised, in writing, by 5:00 p.m. on May 30, 1984, regarding the results of the parties' efforts.

In the event that the parties are unable to resolve these matters, Plaintiff is *DIRECTED* to file with the Court, by 5:00 p.m. on June 6, 1984, a statement, together with all documents required by Rule 104 of our Local Rules of Practice, in support of his claim for *reasonable* attorney's fees. Plaintiff's statement should include, to the greatest extent possible, a discussion of the amount of fees, reasonably necessary to the recovery of the $5,000.00 judgment in this case, which were incurred before and after the filing of Defendant's offer of judgment. Defendant is *DIRECTED* to file a response to Plaintiff's statement by 5:00 p.m. on June 15, 1984. Unless otherwise ordered, the Court will rule on this matter without oral argument.

— ORDER —

For the reasons stated above, the Motion For New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on April 2, 1984, is *DENIED*.

The Amended Motion For A New Trial, Amendment of Judgment, Relief From Judgment Or Order, filed by Plaintiff on

April 6, 1984, is *GRANTED* to the extent that Plaintiff is awarded prejudgment interest on the $5,000.00 judgment in this case, said interest to be calculated from February, 1982 until judgment entered in this case, at a rate of eight percent per annum compounded annually. Plaintiff's Amended Motion, in all other respects is *DENIED*.

The Motion For Attorney's Fees, Filed by Plaintiff on April 2, 1984, is *GRANTED* to the extent that Plaintiff is entitled to reasonable attorney's fees in this case. A determination of the amount of attorney's fees to be awarded will be *HELD IN ABEYANCE* pending completion of the briefing schedule outlined in this order.

The Motion To Review Taxation Of Costs filed by Plaintiff on April 13, 1984, and the Motion To Review Taxation Of Costs filed by Defendant on April 16, 1984, will be *HELD IN ABEYANCE* pending a determination of the amount of attorney's fees to be awarded in this case.

DATED at Denver, Colorado this 17th day of May, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

Sherman G. Finesilver,
Chief Judge
United States District Court

APPENDIX II.D

ORDER OF JULY 3, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs.

BECTON DICKINSON & COMPANY,

Defendant.

— ORDER —

Sherman G. Finesilver, Chief Judge

PLAINTIFF originally brought this action seeking recovery of compensatory and punitive damages on the following theories of recovery: breach of contract, quantum meruit, misrepresentation and/or fraudulent conce .lment, and wrongful termination. On May 31, 1983, the Court granted in part and denied in part Defendant's motion for summary judgment, and dismissed Plaintiff's claims for breach of contract, wrongful termination, outrageous conduct, and quantum meruit on the original contract entered into by the parties. A trial on this matter was held commencing June 6, 1983. Said trial resulted in a mistrial. The matter proceeded to a retrial on March 19, 1984. A jury verdict was returned on March 23, 1984, in favor of the Defendant on Plaintiff's claims of fraudulent concealment and/or misrepresentation, and quantum meruit as to the sale of spare parts and accessories. The jury found in favor of the Plaintiff on his claim for quantum meruit as to the sale of 79 additional PVD units, and awarded the Plaintiff damages in the amount of $5,000.00. On May 14, 1984, the Court entered an order denying Plaintiff's motion for a new trial, amendment

of judgment, and relief from judgment or order. The Court granted in part and denied in part Plaintiff's amended motion for a new trial, amendment of judgment and relief from judgment or order, and awarded the Plaintiff prejudgment interest on the $5,000.00 judgment previously entered in this case. Plaintiff's motion for attorney's fees was granted to the extent that the Court found that Plaintiff is entitled to an award of reasonable attorney's fees; however, the Court held in abeyance a determination of the amount of attorney's fees to be awarded to the Plaintiff.

This matter is before the court on the following motions: (1) a motion for attorney's fees, filed by Plaintiff on April 2, 1984; (2) a motion to review taxation of costs, filed by Plaintiff on April 13, 1984; and (3) a motion to review taxation of costs, filed by Defendant on April 16, 1984. The Court has thoroughly reviewed these motions, as well as the briefs, affidavits and exhibits submitted by the parties in support of their respective positions on said motions. Upon a careful consideration of these matters, the Court finds that Plaintiff is entitled to an award of attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case. The Court further finds that Plaintiff is entitled to an award of costs in this case; however, said award will be limited by the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff originally requested an award of $52,198.00 in attorney's fees with respect to the $5,000.00 judgment entered in this case. This amount was apparently based on the attorney's fees incurred by the Plaintiff with respect to all of the claims for relief asserted by the Plaintiff in the instant case. In our May 14, 1984 order, the Court explained that in calculating the attorney's fees to be awarded in the instant case it is

necessary to consider that the Plaintiff recovered on only one of several claims that he originally asserted against the Defendant. A portion of Plaintiff's claims were dismissed on summary judgment, while others were rejected by the jury. Plaintiff's claim for attorney's fees obviously must be reduced to take into account these factors. *See e.g. Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976); *Scheriff v. Beck*, 452 F. Supp. 1254 (D.Colo. 1978).

Plaintiff, in response to the Court's May 14, 1984 order, submitted a claim for attorney's fees in the amount of $17,132.74, based on Plaintiff's estimate of the fees to be awarded under the "proportionate recovery" analysis described by the Court. In addition, Plaintiff submitted an alternative claim for $18,855.00 in attorney's fees based on a "hypothetical case basis" as the prevailing party on the claim for which judgment was entered in the amount of $5,000.00. The Court is of the view that Plaintiff's requests are unreasonable, and that Plaintiff should be awarded a total of $1,000.00 for reasonable attorney's fees in the instant case.

Initially, the Court notes that even if Plaintiff's request was considered reasonable, the request must be substantially reduced as a result of the offer of judgment filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. As the Court explained in our May 14, 1984 order, any award of attorney's fees in this case must be taxed as costs, and come within the limitations of a valid offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. Defendants submitted an offer of judgment on February 15, 1984, in the amount of $27,000. Said offer was rejected by the Defendant, and the offer clearly exceeds the amount of judgment entered in this case together with the amount of costs (including the amount of attorney's fees sought by the Plaintiff) prior to the date the offer was made. Furthermore, the Court finds Plaintiff's arguments regarding the validity of the Defendant's

offer of judgment to be without merit. The Court has thoroughly reviewed Defendant's offer of judgment, and finds that it is sufficient to meet the requirements of Rule 68 of the Federal Rules of Civil Procedure. Therefore, the Court finds that Plaintiff is not entitled to an award of any costs which might have been incurred after February 15, 1984. Accordingly, Plaintiff is not entitled to an award for any attorney's fees incurred after February 15, 1984.

Plaintiff's request must be further reduced to accurately reflect the limited recovery achieved by the Plaintiff. As we have repeatedly noted, Plaintiff was the "prevailing party" in this case with respect to only one of several claims that he originally brought against the Defendant. In terms of the legal issues involved in Plaintiff's various claims, the discovery reasonably required for presentation of the claims, and the relief requested with respect to the Plaintiff's claims, the single claim upon which the Plaintiff ultimately prevailed was clearly the most limited in scope of all the Plaintiff's claims. Where a plaintiff has enjoyed only a limited success, a reasonable fee must be determined in relationship to the results obtained, and a reduced award is justified where the relief is limited in comparison to the scope of the litigation as a whole. *See Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983).

Upon a review of the records submitted by the Plaintiff, the Court finds that the Plaintiff's request for attorney's fees contains claims for time, travel and discovery which were not necessary or related to the $5,000.00 judgment entered for the Plaintiff. The Court is not willing to require the Defendant to bear the burden of financing Plaintiff's largely unsuccessful lawsuit, particularly in light of the offer of judgment that was filed by Defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure. Furthermore, the Court is of the view that equitable considerations support an extremely limited award of attorney's fees in the instant case. The Defendant clearly prevailed on several claims in this case, and Defendant is

arguably a "prevailing party" entitled to an award of attorney's fees under C.R.S. § 8-4-114. *See e.g. Hartman v. Freedman,* 591 P.2d 1318 (1979). Although the Defendant did not file a motion for an award of attorney's fees in this case, and the Court makes no finding as to whether the Defendant would have been entitled to such an award, a realistic examination of which party actually "prevailed" in this case clearly suggests that the Plaintiff should receive at most an extremely limited award of attorney's fees.

In addition to the factors specifically discussed in this order, the Court, in determining the amount of attorney's fees to be awarded in this case, has considered the factors articulated in *Hensley v. Eckerhart, supra; Mau v. E.P.H. Corp.,* 638 P.2d 777 (Colo. 1981); and *Battle v. Anderson,* 614 F.2d 251 (10th Cir. 1980). Upon a consideration of the relevant factors, the Court finds that Plaintiff is entitled to an award of reasonable attorney's fees in the amount of $1,000.00, to be taxed as costs in the instant case.

— ORDER —

For the reasons stated above, Plaintiff's motion for attorney's fees is *GRANTED* to the extent that Plaintiff is awarded the amount of $1,000.00 in attorney's fees, to be taxed as costs in the instant case.

Defendant's motion to review taxation of costs is *DENIED.* The Court expressly approves and upholds the method of taxation of costs and the amount of costs awarded to the Defendant by the Clerk of the Court on April 10, 1984.

Plaintiff's motion to review taxation of costs is *GRANTED* to the extent that this matter is *REMANDED* to the Clerk of the Court for taxation of costs in accordance with this order.

DATED at Denver, Colorado this 3rd day of July, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX II.E

ORDER OF AUGUST 1, 1984 ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 82-F-462

JOSEPH G. BUDINICH,

Plaintiff,

vs

BECTON DICKINSON & COMPANY

Defendant.

— ORDER —

SHERMAN G. FINESILVER, CHIEF JUDGE

THIS MATTER IS BEFORE THE COURT on the plaintiff's motion for amendment of order, or relief from judgment and order. Plaintiff seeks an increase in the amount of attorney's fees awarded to him by this Court's Order dated July 3, 1984. The gist of the motion is the Court's award of fees is unjust arbitrary, without factual and legal basis, and in the nature of a penalty. The Court has considered the plaintiff's motion. In addition, the Court has carefully reconsidered its Order of July 3, 1984. The award of fees was based on substantial evidence before the Court.

The July 3, 1984 Order takes into account the factors demanded under the applicable case law to be considered in an award of attorney's fees. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (1981); *Battle v Anderson*, 614 F.2d 251 (10th Cir. 1890); *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983). Budinich prevailed on one of six claims brought, winning a $5,000 verdict out of $650,000 in damages originally sought. The plaintiff is entitled to a reasonable attorney's fee. In the Order, the Court

noted the claim upon which Budinich did prevail was the most limited in scope of all the claims. The claim was in no sense complex, either legally or factually. The Court further noted the plaintiff's very limited success, and found, in light of the scope of the litigation as a whole, a reduced award was indeed justified. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983).

In addition to the above findings, the Court also found the request for fees contained time, travel and discovery which were neither necessary nor related to the judgment entered for Budinich. The Court found a valid offer of judgment had been made on February 15, 1984, by the defendant. The amount of the offer was $27,000. Although the Court awarded no fees to the Defendant, the Court did find the defendant was arguably a "prevailing party", noting a realistic examination of which party actually "prevailed" suggested the plaintiff should receive at most an extremely limited award of fees.

The Court is not insensitive to the purposes behind C.R.S. § 8-4-114. However, as states in the July 3 Order, the Court is unwilling to require the defendant to finance a largely unsuccessful lawsuit against itself. Accordingly, the plaintiff's motion for amendment of order, or relief from judgment and order is *DENIED*.

Dated at Denver, Colorado, this 1st day of August, 1984.

BY THE COURT:

/s/ SHERMAN G. FINESILVER

SHERMAN G. FINESILVER,
Chief Judge
United States District Court

APPENDIX III.A

PETITION FOR REHEARING FILED IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 84-2192

JOSEPH G. BUDINICH,
Plaintiff-Appellant,

vs.

BECTON DICKINSON AND COMPANY,
Defendant-Appellee.

PETITION FOR REHEARING

Appellant, Joseph G. Budinich, through the undersigned legal counsel, Frank & Finger, P.C., hereby petitions pursuant to Rule 40 of the Federal Rules of Appellate Procedure for rehearing of this Court's Judgment entered December 12, 1986.

Appellant requests that the Court reconsider and determine the issues of timeliness of this appeal, non-retroactivity, and the award of attorney fees for the reasons set forth herein.

Additionally, Appellant would note that an error appears in the recitation of facts in that the opinion erroneously states that the pleading were amended after Summary Judgment entered. This is not accurate. Amendment occurred prior to Summary Judgment.

I.

THE COURT'S HOLDING ON TIMELINESS OF THE APPEAL SHOULD BE MODIFIED

The Court's holding that a uniform, unqualified rule that attorney fee awards are collateral to the relief obtained is

appropriate in cases where federal law controls, but is inappropriate in pure diversity cases, where substantive state law controls and is contrary to the federal law.

The Constitution of the United States established a rigid balance between the rights granted to the federal government and those rights retained by the states. In that regard, the Tenth Amendment to the United States Constitution specifically reserved unto the states all power not delegated to the United States by the Constitution.

The right of the states to enact their own substantive standards has been repeatedly upheld. Only where such law directly interferes or transgresses on the Commerce Clause or areas expressly preempted have such laws been held to be superseded by Congressional mandate. *United States v. Darby,* 312 U.S. 100, 85 L.Ed. 609, 61 S. Ct. 451 (1941).

Colorado, in providing for labor relations in its state enacted a statute requiring payment of wages on discharge and specifically provided for an award of mandatory attorney fees for violation of that proscription. By case law of the State of Colorado this provision has been determined to be an inherent part of the relief where the statute is violated. *Ortega v. Board County Commissioners,* 657 P.2d 989 (Colo. App. 1982 *cert. denied*); *Ball Corporation v. Loran,* 42 Colo. App. 401, 496 P.2d 412 (Colo. App., 1979); *Marieta v. Busto,* 91 P.2d 345 (Colo. App., 1984) *cert. denied.*

The federal judiciary has no power to modify, change or reverse this substantive determination, unless the holding is unconstitutional or preempted. No such argument of unconstitutionality or preemption is made here.

Clearly, the provision providing for United States District Court's original jurisdiction over diversity actions, 28 U.S.C. § 1332, which in and of itself does not emanate from the United States Constitution, cannot preempt Colorado substantive law. *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.Ed. 226, 43 S. Ct. 79 (1922).

Yet, that is exactly what this Court has done in its December 12, 1986 order. It has substantively changed the law of the State of Colorado. That procedure is violative of fundamental Constitutional principles and a marked departure from the teachings of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) and even *Hanna v. Plumer,* 380 U.S. 460 (1965). The determination is most certainly "*outcome determinative*" and clearly a new pronouncement of law.

II.

THE DECISION SHOULD BE GIVEN ONLY PROSPECTIVE APPLICATION

The December 12, 1986 decision of the Court is a new determination of the law. For the first time in this Circuit or any other circuit to Appellant's knowledge has a court grappled with the concept of whether state substantive law on attorney fees controls in diversity cases, and its import to the teachings of *White v. New Hampshire,* 455 U.S. 445 (1982).

Non-retroactivity is clearly inappropriate in this matter for the reasons previously set forth in Appellant's prior brief.

III.

THE ATTORNEY FEE AWARD REQUIRES FURTHER EXAMINATION

In disposing of the attorney fee award question, as it did, this Court failed to perceive that briefs on the merits have not been filed or authorized. The only issues briefed and submitted to the Court were briefs on the merits of the question of summary disposition based on jurisdictional arguments.

The District Court's decision on attorney fees is clearly erroneous. Facts and critical determinations, such as number of hours worked on the claim, hourly rate, defendant engaging in extensive discovery and the like, have never been presented because of the posture of the case. The Court, in its holding that the attorney fee question is properly before it, now should examine the merits.

Appellant asks only for fundamental fairness in presenting the issues to the Court. The $1,000.00 attorney fee award is far less compensation than is justified by any objective standard relating to time expense in proving the wage claim for the supplemental order.

An examination of the record with brief will easily clarify the erroneous attorney fee holding.

IV.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant requests rehearing and modification of this Court's order of December 12, 1986, and specifically asks this Court to consider the appeal in its entirety on the merits.

Respectfully submitted,
FRANK & FINGER, P.C.

By: /s/ WILLIAM S. FINGER

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Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-283

IN THE

Supreme Court of the United States

October Term, 1987

JOSEPH G. BUDINICH,

Petitioner,

v.

BECTON DICKINSON AND COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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**Application for Admission filed or to be filed

PETITION FOR CERTIORARI FILED JULY 14, 1987
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*Appears At Pages 55 Through 59 Of Petition For Writ Of Certiorari

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July 1, 1982	First Amended Complaint For Money Damages filed in Budinich vs. Becton Dickinson & Company, The United States District Court For The District Of Colorado, C.A. No. 82F462
July 8, 1982	Answer To First Amended Complaint filed by Becton Dickinson & Company, The United States District Court For The District Of Colorado, C.A. No. 82F462
April 13, 1983	Amended Pretrial Order entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 29, 1983	Motion For Summary Judgment filed by Becton Dickinson & Company in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 13, 1983	Motion For Partial Summary Judgment filed by Budinich in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 31, 1983	Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment And Order Denying Plaintiff's Motion For Partial Summary Judgment, The United States District Court For The District Of Colorado, C.A. No. 82F462
June 2, 1983	Motion For Reconsideration Of Summary Judgment Order Or In The Alternative For Certification Of Question Of Law To The Colorado Supreme Court filed by Plaintiff, The United States District Court For The District Of Colorado, C.A. No. 82F462
June 6, 1983	Minute Order denying Motion For Reconsideration and Certification of Question to Colorado Supreme Court entered in The United States District Court For The District Of Colorado, C.A. No. 82F462

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April 2, 1984	Motion For New Trial, Amendment of Judgment; Relief From Judgment Or Order filed by Budinich in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 2, 1984	Motion For Attorneys Fees filed by Budinich in The United States District Court For the District Of Colorado, C.A. No. 82F462
April 6, 1984	Amended Motion for New Trial, Amendment of Judgment, Relief from Judgment or Order filed in The United States District Court For The District of Colorado, C.A. 82F462
April 6, 1984	Memorandum In Support Of Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462

April 6, 1984	Memorandum In Support Of Amended Motion For New Trial; Amendment Of Judgment; Relief From Judgment Or Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 6, 1984	Memorandum In Support Of Attorneys Fees As Costs filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 13, 1984	Motion To Review Taxation Of Costs filed by Plaintiff in The United States District Court For The District Of Colorado, C.A. No. 82F462
April 16, 1984	Motion To Review Taxation Of Costs filed by Becton Dickinson & Company in The United States District Court For The District Of Colorado, C.A. No. 82F462
May 14, 1984	Order relating to post trial motions, granting attorney fees to Plaintiff but holding amount in abeyance entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 3, 1984	Order granting to Plaintiff $1,000.00 attorney fees entered in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 13, 1984	Motion For Amendment Of Order Or, Relief From Judgment And Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
July 13, 1984	Memorandum In Support Of Motion For Amendment Of Order Or, Relief From Judgment And Order filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
August 1, 1984	Order denying reconsideraton entered in The United States District Court For The District Of Colorado, C.A. No. 82F462.

August 29, 1984	Notice Of Appeal filed in The United States District Court For The District Of Colorado, C.A. No. 82F462
September 25, 1984	Defendant's Motion For Summary Disposition Of Appeal filed in The United States Court Of Appeal For The Tenth Circuit, No. 84-2192
December 12, 1984	Per Curiam Opinion of The United States Court Of Appeals For The Tenth Circuit, No. 84-2192
December 26, 1986	Petition For Rehearing filed in The United States Court Of Appeals For The Tenth Circuit, No. 84-2192
March 26, 1987	Order denying Petition For Rehearing, reviewed as a Motion For Recall entered in The United States District Court Of Appeals For The Tenth Circuit, No. 84-2192
June 23, 1987	Application For Extension Of Time To File Petition For Writ Of Certiorari filed by Plaintiff to the United States Supreme Court, C.A. No. A-946
July 14, 1987	Petition For Writ of Certiorari filed with The United States Supreme Court, C.A. No. 87-283
September 8, 1987	Brief of Respondent Becton Dickinson in opposition to Petition For Writ of Certiorari filed in The United States Supreme Court, C.A. No. 87-283
October 13, 1987	Order of Supreme Court granting Writ of Certiorari, C.A. No. 87-283

FIRST AMENDED COMPLAINT FOR MONEY DAMAGES DATED JULY 1, 1982 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 82-F-462

JOSEPH G. BUDINICH, Plaintiff,	)	
vs.	)	FIRST AMENDED COMPLAINT FOR MONEY DAMAGES
BECTON DICKINSON & COMPANY, Defendant.	)	

Plaintiff brings this action and alleges as follows:

1. This is an action for breach of contract, quantum meruit, misrepresentation and outrageous conduct.

2. Plaintiff Joseph G. Budinich at all times relevant hereto resided in Arapahoe County, Colorado and worked in the City and County of Denver at Suite 111, 180 Cook Street, Denver, Colorado.

3. Defendant Becton Dickinson and Company, a foreign corporation, whose principal place of business is located in Paramus, New Jersey, is not registered with the Secretary of the State of Colorado to do business in this state. At all times relevant hereto, Defendant did business in this state through a division of said corporation known as Energetics Science at a branch office located at 180 Cook Street, Suite 111, Denver, Colorado 80206.

4. Prior to October 25, 1978, Plaintiff Joseph Budinich entered into a business relationship with Energetics Science, Inc. as a manufacturer's representative.

5. During this business relationship, Defendant Becton Dickinson and

Company acquired Energetics Science, Inc. and continued the relationship between the Plaintiff and Energetics Science.

6. On or about October 1, 1978 the Plaintiff was approached by a representative of the Defendant who solicited the Plaintiff for association as Western Regional Manager for Defendant's Energetic Science division.

7. During the month of October 1978 correspondence was exchanged between the Plaintiff and representatives of the Defendant pertaining to responsibility of the Western Regional Manager position and the compensation that would be paid.

8. The following benefits and compensation were promised by Defendant to Plaintiff if Plaintiff accepted the position of Western Regional Manager:

a. $22,000 per year salary paid bi-weekly.
b. 100% business expenses paid by the Company.
c. A leased car with a new car available every two years.
d. Commissions pursuant to set schedule which is attached to this complaint as Exhibit A and incorporated by reference.
e. Two weeks paid vacation, life insurance equal to one year's salary paid by the company, travel insurance valued at $50,000 paid by the company, Blue Cross major medical high option company paid coverage.

9. Based on the oral and written representations of the Defendant, Plaintiff accepted association as Western Regional Manager for Defendant and operated an office for the Defendant at 180 Cook Street, Denver, Colorado.

10. Immediately upon accepting employment with the Defendant, Plaintiff began working on a potentially lucrative proposal to provide propellant vapor detector equipment manufactured by Energetic Science Division to the Air Force for its space and missile program.

11. During the early part of May, 1979, Plaintiff met with Air Force officials regarding this project and reported back to the Company

concerning his meeting reporting that the project was at least a million dollar deal and 90% sold.

12. After the May, 1979 meeting with the Air Force, Plaintiff continued to work on the project and received an oral commitment from the Air Force to purchase the equipment. This commitment was known to the Defendant and its employees including Plaintiff's supervisor.

13. During the months of September - October, 1979 Defendant unilaterally changed its commission structure with the express intent of depriving the Plaintiff and others in similar positions of substantial commission for large orders that were, or were about to be, earned.

14. After the change of commission format, the Defendant and the U.S. Air Force through Plaintiff's efforts entered into a contract for sale of the propellant vapor detective device equipment referred to above.

15. Subsequent thereto during calendar year 1981 the contract was updated and modified to a $2,116,000.00 contract. Thereafter, at an unknown date, a supplemental order was executed by the Air Force and the Defendant in the approximate amunt of $850,000.00.

FIRST CLAIM FOR RELIEF

16. Plaintiff incorporates by reference paragraphs 1 through 15 of this complaint.

17. The employment contract entered into between Plaintiff and Defendant calls for a fixed and established commission schedule that was negotiated between the parties.

18. Plaintiff relying on said employment contract including the schedule of commissions, substantially negotiated a contract with the United States Air Force for the sale of the propellant vapor detector equipment that was manufactured and supplied by the Defendant.

19. Defendant knowing said contract was eminent willfully and intentionally breached the provisions of the employment contract with Plaintiff by

unilaterally changing the agreed upon compensation schedule.

20. The decision by Defendant to modify the compensation schedule with the Plaintiff was a deliberate and willful attempt to avoid paying the commission that was or was about to become due.

21. Said unilateral modification was done after substantial reliance by the Plaintiff and substantial performance by the Plaintiff under the terms of the employment contract.

22. Defendant's actions were a breach of contract.

23. Plaintiff is entitled to, pursuant to the commission schedule under which he was hired, an amount of $84,640.00 in commission as a result of the inital contract entered into with the United States Air Force for propellant vapor detector equipment, and an additional amount to be proven at trial on the supplemental order on the propellant vapor detector equipment.

24. Defendant has paid to the Plaintiff at this time $10,000 as a commission, relating to the sale of said equipment to the Air Force.

25. As a direct and proximate result of Defendant's breach of contract, Plaintiff has been deprived of $74,640 due and owing pursuant to the employment contract entered into between the Plaintiff and Defendant on the 1981 order, and an additional amount to be proven at trial on the supplemental order.

WHEREFORE, Plaintiff prays that this Court enter judgment for the Plaintiff against the Defendant in the amount of $74,640 on the 1981 contract and an additional amount to be proven at trial on the supplemental order, plus interest and costs.

SECOND CLAIM FOR RELIEF

26. Plaintiff brings this claim in the alternative to the first claim for relief and realleges and incorporates by reference paragraphs 1 through 15.

27. At the time Defendant unilaterally modified the commission schedule without Plaintiff's consent, no binding contract existed between the parties.

28. Plaintiff is entitled to the value of the services he has rendered.

29. The value of the services rendered by the Plaintiff to this Defendant according to the custom and standard of the industry would entitle the Plaintiff to at least a 15% commission on goods and services sold.

30. Plaintiff in this action secured for Defendant an initial contract in the amount of $2,116,000.00 and a supplemental contract in excess of $800,000.00, for which he is entitled to a commission in an amount in excess of $437,400.00.

31. Defendant has paid to the plaintiff $10,000.00. An unpaid amount of approximately $427,400.00 is due and owing the Plaintiff for the value of services rendered.

WHEREFORE, Plaintiff prays the Court enter judgment for the Plaintiff against the Defendant in an amount to be proven at trial, plus interest in costs.

THIRD CLAIM FOR RELIEF

32. Plaintiff realleges and incorporates by reference paragraphs 1 through 25.

33. Defendant had no intention of paying the Plaintiff commissions on large orders as represented in the written material supplied and oral promises made to the Plaintiff.

34. The writings supplied and oral promises made by Defendant to Plaintiff constituted a material misrepresentation of Defendant's commission schedules and intentions to compensate Plaintiff for sales.

35. Said misrepresentation regarding the commission schedule was a material misrepresentation of fact that was reasonably relied upon by the Plaintiff.

36. On information and belief said misrepresentation was made willfully, wantonly or negligently by Defendant.

37. As a result of said misrepresentation Plaintiff was induced to

actively solicit large accounts, including but not limited to the contract in question, and Plaintiff spent substantial time and energy in securing contracts under the reasonable belief that he would be compensated as promised.

38. As a result of Defendant's misrepresentation Plaintiff has been deprived of commissions in an amount to be proven at trial, that is in excess of $74,640.

WHEREFORE, Plaintiff prays that the Court enter the following relief for Plaintiff against Defendant:

a. Award Plaintiff compensatory damages in an amount to be proven at trial.

b. Award Plaintiff punitive damages in the amount of $350,000.

c. Award Plaintiff interest and costs in bringing this action.

FOURTH CLAIM FOR RELIEF

39. Plaintiff realleges and incorporates by reference paragraphs 1 through 38.

40. During the later part of 1981 Plaintiff and Defendant became aware that the Air Force would place a supplemental order relating to the vapor detector equipment.

41. In anticipation that the order would be placed, Defendant terminated the employment of the Plaintiff on November 30, 1981 with the express intent of depriving Plaintiff of any additional commissions on said order.

42. Said termination was done contrary to Defendant's internal policies, directives, and procedures.

43. Said firing was pretextural and done wilfully, wantonly and intentionally.

44. Defendant's conduct in total and in terminating Plaintiff under the circumstances set forth herein is conduct of a shocking or outrageous nature to the ordinary person, and constitutes outrageous conduct.

45. As a direct and proximate result of Defendant's outrageous conduct, Plaintiff was deprived of income and salary from January 1, 1982 through April 1, 1982 in the amount of $6,775.00. Further, as a direct and proximate result of Defendant's action, Plaintiff was deprived of additional commissions on the orders placed on the vapor detector equipment.

WHEREFORE, Plaintiff prays the Court enter the following relief for Plaintiff and against Defendant:

a. Award Plaintiff compensatory damages in the amount of $6,775.00 for loss of wages.

b. Award Plaintiff compensatory damages in an amount to be proven at trial for loss of commission on the Air Force contract.

c. Award Plaintiff punitive damages in the amount of $350,000.00.

d. Award Plaintiff interest and costs in bringing this action.

PLAINTIFF DEMANDS A JURY TRIAL OF SIX PERSONS.

Respectfully submitted,

FRANK, LOWE AND FINGER, P.C.

By _____/ sig /_____

William S. Finger, #7224
29025D Lakeshore Center
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*[Attachment omitted in printing]

ANSWER TO FIRST AMENDED COMPLAINT FILED IN THE UNITED STATES DISCTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Defendant Becton Dickinson & Company, by and through counsel, Kelly/Haglund/Garnsey & Kahn, for its answer to Plaintiff's First Amended Complaint, admits, denies and avers as follows:

GENERAL ALLEGATIONS

1. The allegations of paragraph 1 of the Complaint are admitted.

2. Answering paragraph 2, the defendant has insufficient information or knowledge to form a belief as to the truth of the allegation as to Plaintiff's residence, and the same is therefore denied. The remaining allegations in paragraph 2 are admitted.

3. Answering paragraph 3, defendant admits that Becton Dickinson & Company is a corporation with its principal place of business in Paramus, New Jersey, and that it is doing business in Colorado through a wholly owned division of the company known as Energetics Science acquired by the defendant on or about June 28, 1978. Defendant further admits that the office used by Plaintiff during his business relationship with defendant was located at 180 Cook Street, Suite 111, Denver, Colorado 80206.

4-5. Answering paragraphs 4 and 5, defendant, based on information and belief, admits that Plaintiff was a manufacturers representative for Energetics Science prior to the time that the defendant acquired that company. Defendant further admits that defendant acquired Energetics Science, Inc. on or about June 28, 1978, and changed the name of that company to Energetics Science. Defendant denies the remaining allegations of paragraphs 4 and 5.

6. Answering paragraph 6 of the Complaint, defendant admits that, during October of 1978 the Plaintiff and a representative of the defendant

engaged in discussions concerning the employment of plaintiff as the Western Regional Manager for Energetics Science. Defendant denies the remaining allegations of paragraph 6.

7. Answering paragraph 7 of the Complaint, defendant admits that correspondence was exchanged in October of 1978 between plaintiff and Mr. John D. McStravick, Vice President of Marketing, Energetics Science, relating to the duties and responsibilities of the Western Regional Manager and concerning the compensation and the specific commission plan in effect during the fiscal year up to and including October 25, 1978. The remaining allegations of paragraph 7 are denied.

8. Answering paragraph 8 of the Complaint, defendant admits that on October 25, 1978, it advised plaintiff that the position of Western Regional Manager for Energetics Science would include the following benefits and compensation:

(a) A salary of $22,000 per year paid bi-weekly.

(b) All business expenses to be paid by the Company.

(c) A leased car with a new car available every two years.

(d) Commissons to be paid pursuant to a commission schedule to be adjusted at the beginning of each fiscal year of employment. The commission schedule in effect on October 25, 1978 and until September 30, 1979 is that schedule attached to the complaint.

(e) Two weeks paid vacation, life insurance equal to one year salary paid by the company, travel insurance valued at $50,000 paid by the company, and Blue Cross major medical high option company paid coverage.

Defendant denies the remaining allegations of paragraph 8.

9. Answering paragraph 9 of the Complaint, defendant admits that plaintiff was employed as Western Regional Manager for Energetics Science beginning on January 1, 1979, and operated an office located at 180 Cook Street, Suite 111, Denver, Colorado. The remaining allegations of paragraph 9 are denied.

10. Answering paragraph 10, defendant admits that, beginning in January, 1978, Energetics Science was engaged in negotiating to provide propellant vapor detector equipment to the United States Air Force. Defendant further admits that numerous employees of defendant and Energetics Science, including plaintiff, were involved in these negotiations during the period from January of 1978 through and including the present, including that period when plaintiff was acting as Western Regional Manager for Energetics Science. The remaining allegations of paragraph 10 are denied.

11.-12. Answering paragraphs 11 and 12, defendant admits that negotiations between Energetics Science and the United States Air Force took place in 1979, said negotions involving modifications requested by the Air Force prior to entering into a contract with the defendant. Defendant specifically denies that any contract, order or commitment between the United States Air Force and Energetics Science or defendant was entered into in calendar year 1979. The remaining allegations of paragraphs 11 and 12 are denied.

13. Answering paragraph 13, defendant admits that the commission plans applicable to plaintiff and all other regional managers were as follows:

Fiscal Year	Period Covered	Effective Date of Plan/Change
FY 1979	October 1, 1978 — September 30, 1979 (for plaintiff: January 1, 1979 — September 30, 1979)	October 1, 1978
FY 1980	October 1, 1979 — September 30, 1980	October 1, 1979
FY 1981	October 1, 1980 — June 30, 1981	October 1, 1980
FY 1982	July 1, 1981 — June 30, 1982	July 1, 1981

Defendant admits that, on or about January 21, 1981, the fiscal year applicable to commissions was changed to reflect a period from July 1st to June 30th of the applicable years, in order to insure that orders entered within a given quarter of commission year would be shipped within the corresponding fiscal year. The remaining allegations of paragraph 13 are specifically denied.

14-15. Answering paragraphs 14 and 15, defendant admits that Energetics Science, accepted a letter contract with the United States Air Force on August 6, 1980, for the sale to it of propellant vapor detector equipment in the amount of one million nine hundred thirty five thousand three hundred seventy two dollars and 60/100 ($1,935,372.60). Defendant admits that said letter contract was superseded by a definitive contract, executed on or about August 7, 1981 in the adjusted amount of two million one hundred sixteen thousand dollars ($2,116,000.00) and that a second supplemental order in the adjusted amount of $2,478,018.00. On or about January 1982, a second and separate contract was negotiated and executed between the defendant and the U.S.A.F., that contract being for additional vapor propellant detector equipment in the amount of $600,013.00. Defendant admits that the applicable commission plans for plaintiff and all other regional managers in effect during those time periods were the plans for fiscal year 1980 and fiscal year 1981, respectively. The remaining allegations of paragraph 14 and 15 are denied.

FIRST CLAIM FOR RELIEF

16. Answering paragraph 16 of the First Claim for Relief, defendant hereby incorporates by reference the answers made to the allegations of paragraph 1 through 15 above.

17. Answering paragraph 17, defendant admits that the employment arrangement between plaintiff and defendant incorporated such commission schedules as were to be established from time to time by the defendant. The remaining allegations of paragraph 17 are denied.

18-23. Defendant denies the allegations contained in paragraphs 18 through 23.

24. Answering paragraph 24, defendant admits that plaintiff had been paid $10,000 to date as a commission relating to the definitive contract between the United States Air Force and defendant dated August 7, 1981.

25. Defendant denies the allegations contained in paragraph 25.

SECOND CLAIM FOR RELIEF

26. Answering paragraph 26 of the Second Claim for Relief, defendant hereby incorporates by reference the answers to paragraphs 1 through 15 above.

27-31. Defendant admits that it has paid $10,000.00 to Plaintiff as commissions on the sale of propellant vapor detector equipment to the United States Air Force. Defendant denies all other allegations contained in paragraphs 27 through 31.

THIRD CLAIM FOR RELIEF

32. Answering paragraph 32 of the Third Claim for Relief, defendant hereby incorporates by reference the answers to paragraphs 1 through 25 above.

33-38. Defendant denies the allegations of paragraphs 33 through 38.

FOURTH CLAIM FOR RELIEF

39. Answering paragraph 39 of the Fourth Claim for Relief, Defendant hereby incorporates by reference the answers to Paragraphs 1 through 38 above.

40. Answering paragraph 40 of the Fourth Claim for Relief, Defendant has no information or knowledge concerning Mr. Budinich's "awareness"

of a supplemental Air Force Contract, and therefore denies the same. Defendant admits that the Air Force Contract in question was modified on March 11, 1982 after continuing negotiations with the Air Force.

41-45. Defendant denies the allegations of paragraphs 41 through 45.

SECOND AND SEPARATE DEFENSE

By accepting changed commissions and changed compensation under the commission plans for fiscal years 1980, 1981, and 1982 plaintiff has acquiesced to such plans, and his claims against defendant are barred by such acquiescence.

THIRD AND SEPARATE DEFENSE

Any claim for punitive damages is barred by 1973 C.R.S. 13-80-104.

WHEREFORE, defendant prays that judgment be entered in its favor, for its costs herein, and for such further relief as the court may deem proper. In addition, defendant is entitled to its attorney's fees in defending against The Third Claim for Relief and Fourth Claim for Relief in their entirety, and against The Second Claim for Relief to the extent said claim seeks damages in excess of $74,640, because said claims are frivolously brought and maintained under 1973 C.R.S. 13-17-101.

[Signature and Certificate on service omitted in printing]

MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT ORDER OR IN THE ALTERNATIVE FOR CERTIFICATION OF QUESTION OF LAW OF THE COLORADO SUPREME COURT DATED JUNE 2, 1983 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Joseph Budinich hereby moves the Court for reconsideration of its order of Partial Summary Judgment entered on May 31, 1983, granting in part Defendant's Motion for Summary Judgment relating to the contract claims and wrongful discharge claims in this matter. As grounds for this motion Plaintiff will show the Court as follows:

1. The Court in its order of May 31, 1983 found as a matter of fact and law that the employment relationship between the parties was a terminable at will situation. This finding by the Court was made without consideration of the Employment Manual and Personnel Policy Handbook of the Defendant. Plaintiff has endorsed this Handbook as Plaintiff's Exhibit 16, and page 4.6 of the Personnel Manual as Exhibit 14. Plaintiff submits that the Court's finding is an incorrect conclusion at law and fact. The Personnel Handbook clearly abates the terminable at will positions and controls relating to terminability. Plaintiff in its Motion For Summary Judgment included a copy of the disciplinary procedure, marked as deposition Exhibit 19, that was entered in the deposition of Defendant McStravick filed with the Court.

In relevant part the disciplinary action procedure establishes a five step process that must be conformed with prior to termination. The description of the procedure is a formal procedure "to provide a consistent and fair system for counseling and disciplinary action when necessary." Further, the procedure requires formal written steps, signature of the employee on disciplinary action and copies of the disciplinary action steps being placed in the personnel file of the employee. There is no testimony in the record to

support Defendant's termination based on the five required disciplinary steps, or any indication that gross misconduct or an infraction of the rules occurred to warrant immediate termination. As indicated in Plaintiff's Brief, the State of New York has already determined that an Employer's Handbook can abregate the policy of terminable at will. See, Weiner v. McGraw-Hill, Inc. 443 N.E.2d 441 (N.Y. 1982). (See, also, Murphy v. American Home Products Corp. State of New York Court of Appeals, Number 35 slip opinion (March 29, 1983) at page 7 supplied in Defendant's last Brief, reaffirming the Weiner, supra decision. Colorado has not considered the question. Plaintiff asserts that Defendant, whose principal place of business for its Energetic Science Division is New York State, is estopped from claiming that New York law does not control on the question of terminable at will under its handbook. Plaintiff believes that this Court has erroneously made a legal and factual determination on the issue of terminable at will without considering an essential element in this case.

2. The Court has erroneously held that since the employment situation was terminable at will, the compensation system was terminable at will. The assumption by the Court is inherently wrong both as to the legal position adopted by the parties, the factual situation and the underlying assumption that the employee-employer relationship was terminable at will. Defendant's position throughout this litigation was that the commission schedule was a minimaily guaranteed program for a fiscal year. (The fiscal year ended September 30, 1979). Plaintiff's position was that the commission schedule was a guaranteed and represented as applying throughout the course of employment. Plaintiff is prepared to show as a factual matter that Defendant in at least one other circumstance has represented that the entire compensation program which included a car, was the agreement and to renege on any agreed upon condition or term would be improper. See attached memo from John McStravick to Robert Lieb dated March 19, 1981. Plaintiff is prepared to show that the two employees mentioned in the memorandum were employed approximately at the same time Plaintiff was employed. Plaintiff

contends that the compensation schedule was a condition of employment and was considered in accepting the position. Plaintiff additionally attaches a memorandum dated November 24, 1981 from McStravick to Lieb indicating that the items covered in the compensation plan were conditions of employment. This is exactly Plaintiff's claim and the Court has erroneously summarily judged the issue.

3. The Court has wrongfully precluded Plaintiff from claiming a commission under contract for the sale of the 79 PVD's. The evidence is unequivacable that this sale, including number of items, terms of sale, and price was fully negotiated and completed on Plaintiff's last day of employment. In this regard the depositions, testimony of witnesses, and endorsed Exhibits to demonstrate that on March 13, 1981 the Air Force furnished to the Defendant a solicitation, offer and award under RFP. FD2020-81-25404 for solicitation to bid on the sale of 66 PVD units, with Defendant being the only known source. On March 23, 1981 Defendant's agent Curry issued a memorandum informing other corporate employees of the receipt of the RFP indicating quote "Our proposal will not entail an elaborate submission. It will only consist of the cost data and a simple technical proposal stating that the units to be supplied will duplicate those as finally approved and accepted under the existing contract." A copy of that memorandum is attached. The evidence will further indicate that on July 22, 1981 the Air Force modified the amendment of soliciation by increasing the quantity from 66 to 79 PVD units and establishing other items to be procured. A copy of that amended solicitation is attached. On August 31, 1981 Defendant's agent responded to the solicitation with a proposal. On October 6, 1981 the Defendant submitted a revised proposal indicating that the parties were striding for a contract prior to December 1, 1981. See second page of October 6, 1981 letter. A copy of that document is attached. Between October 6, 1981 and November 5, 1981 the parties has agreed upon everything but price because an audit needed to be done. By November 5, 1981 the audit had been completed and certain questions were raised. (See November 5, 1981 letter attached). On

November 30, 1981 the parties reached final agreement regarding the contract terms and price, fixing the total negotiated price at $600,013.00. A copy of Defendant's letter to that effect is attached. Approximately eight days after the agreement on final price was reached Defendant was informed by telephone that a contract number had been assigned to the project. That information appears in a handwritten memorandum from Defendant's contract administrator, attached hereto.

Plaintiff's last day of employment with Defendant was November 30, 1981. Plaintiff is entitled to have the jury consider whether the terms of contract has been fully and completely negotiated and an agreement had been reached on November 30, 1981 for the procurement of the 79 PVD's. Even if this Court does not accept the theory that the 4% commission was binding throughout Plaintiff's employment, Plaintiff would still be entitled to a $5,000 commission on the sale of the 79 PVDs under the then existing major order program imposed by the Defendant. The question of whether this sale took place within the terms of employment is clearly one of fact. See Great Falls Property, Inc. v. Professional Group, Ltd. 649 P.2d 1028 (Colo. 1982). The Court's ruling is clearly erroneous.

4. The Court has erroneously summarily judged the outrageous conduct claims. The Court must reconsider its position in lieu fo the disciplinary action procedure policy and it serving as a limitation on the at will employee situation. Substantial facts as enumerated within the briefs show a pattern of reckless disregard for its rights in this matter. The question is one inappropriately taken away from the jury's consideration.

5. The Court has wrongfully decided the question of waiver or estoppel in this matter. The evidence is clear and uncontradicted that Mr. Joseph Budinich when initially informed of the unilateral modification of commission schedule, protested that modification. The record is quite clear that not only did Mr. Budinich immediately protest the change in letter form, but orally raised the objection on numerous occasions. The Court also erroneously finds that Mr. Budinich continued to accept commission under the revised

schedule. The Court obviously doesn't understand that no commission was paid to Mr. Budinich under the revised schedule on major orders other than the commission in question. The Court impliedly holds the only available avenue of redress to the employee was either quitting employment, thereby potentially forfeiting the commission, or maintenance of a legal action for anticipatory breach of contract. Since no commission was due until the order was finalized according to Defendant's statement, Plaint could not claim a wrong for actual breach. The actual breach of contract occurred in or about October, 1981. The Court has no valid factual or legal basis on which it can draw its conclusion. The rule of law governing this matter is that where a breach of contract exists, the party not in breach may elect to complete performance and thereafter sue for money damages. The innocent party is not required to terminate performance and jeopardize the possibility of recovery. This Court has committed a substantial error in its holding in regard to the waiver and estoppel issue.

6. The Colorado Supreme Court has not addressed any questions relating to wrongful termination of employment. The leading case in this state is from the Court of Appeals. In that decision the Court of Appeals did not consider the question of whether willful violation of one's own Employment Manual constitutes wrongful termination. Similarly, the Supreme Court has not faced the question whether intentioanl firing in anticipation of receipt of a substantial order constitutes wrongful termination. This Court has summarily dismissed Plaintiff's claim of wrongful termination without basis under Colorado law. The appropriate actionf or this Court under those issues, if the Court was considering dismissal, was certification to the Colorado Supreme Court for a definative statement of the law in this state. The Court has erred in failing to take such steps to reach a definitive outcome on issues of first impression.

7. Plaintiff submits that this Court has also failed to consider questions of promissory estoppel, bad faith modification of commission schedules and other issues raised in the memorandum submitted by Plaintiff.

WHEREFORE, Plaintiff requests that this Court reinstate the dismissed claims and allow this matter to proceed to trial on all issue, or alternatively to certify to the Colorado Supreme Court questions of first impression under the laws of this state.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR NEW TRIAL: AMENDMENT OF JUDGMENT: RELIEF FROM JUDGMENT OR ORDER DATED APRIL 2, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff Joseph Budinich, pursuant to Rules 59 and 60 of the Federal Rules of Civil Procudre hereby moes this Court for a new trial, amendment of judgment and relief from judgment or order. As grounds for this motion Plaintiff would specifically show the Court that it seeks a new trial, amendment of judgment and relief from judgment or order as follows:

1. Plaintiff seeks amendment of judgment, and relief from judgment or order from the Court's Summary Judgement Order dated May 31, 1983 granting in part Defendant's Motion for Summary Judgment relating to Plaintiff's contract claims and implied contract claims relating to the sale of the 157 PVD order.

2. Plaintiff seeks amendment of judgment and relief from judgment or order from the Court's Summary Judgment Order dated May 31, 1983 granting to Defendant summary judgment on Plaintiff's contract and implied contract claims on the amendment to the original contract providing for provisioning and spare parts.

3. Plaintiff moves for amendment of judgment and relief from judgment or order relating to the Court's May 31, 1983 granting a partial summary judgment to the Defendants on Plaintiff's outrageous conduct claims.

4. Plaintiff moves for amendment of judgment and relief from judgment or order relating to the Court's granting of summary judgment on May 31, 1983 pertaining to Plaintiff's claim of wrongful termination.

5. Plaintiff moves for amendment of judgment and relief from judgment or order in this Court's order, entered in open Court on June 6, 1983 denying Plaintiff's motion for reconsideration of its Order of May 31, 1983 relating to summary judgment.

6. Plaintiff moves this Court for amendment of judgment and relief from judgment or order relating to this Court's Order denying certification to the Supreme Court of the State of Colorado the issue of wrongful termination, which Order was entered in open Court on June 6, 1983.

7. Plaintiff moves for amendment of judgment and relief from judgment or order on this Court's denial of Plaintiff's motion for reinstatements of claims, which this Court denied in open Court on March 19, 1984.

8. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based on the Court's denial of Plaintiff's motion for reconsider and reinstatement of claims made orally on March 24, 1984.

9. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based on the Court's failure to allow amendment of pleadings which motion was made orally on March 24, 1984.

10. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order relating to the juries finding of no liability on behalf of Defendant pertaining to a claim of misrepresentation or concealment by Defendants.

11. Plaintiff moves for a new trial; amendment of judgment and relief from judgment or order based upon the juries finding of no liability in implied contract relating to the sale of spare parts and provisioning equipment to the Air Force in conjunction with the 157 PVD order.

As grounds for this motion Plaintiff would show the Court as follows:

a. On May 31, 1983 this Court entered an Order granting partial summary judgment to the Defendants;

b. The Court's Order granting partial summary judgment is legally erroneous, and improperly analyzes the laws of the State of Colorado in regard tot he questions of contract, implied contract, waiver, outrageous conduct, and wrongful termination;

c. The Cour't Order of May 31, 1983 further incorrectly analyzes factual evidence presented in support of the respective motion, including a total disregard of Plaintiff's Affidavit indicating that Plaintiff continued to discuss

the change in commission schedule with his supervisors and representatives of the company after the change was announced. The Court in granting summary judgment on this issue disregards the fact that waiver is an affirmative defense and that evidence in the record existed that waiver did not occur;

d. The Court's Order of May 31, 1983 is ambiguous, self contradictory and not supported by factual basis relating to the issue of waiver in that the Court permits Plaintiff to try the tort claim with the question of waiver being one for the jury, but does not permit the contract claim to be tried bacause the Court deemed waiver occurred;

e. The Court in its Order of May 31, 1983 erroneously concluded that wrongful termination is not a tort recognized in the State of Colorado. The Court failed to consider the totality of circumstances under which termination occurred, the fact that Colorado has not reviewed the question of whether an employer must fully comply with his own internal handbook and policies when terminating an employee, and whether an employer may terminate an employee to prevent the collection of commission;

f. The Court in its Order of May 31, 1983 erroneously ruled that the tort of outrageous conduct had not occurred. Substantial factual evidence was proffered to demonstrate that the elements of this tort were prima facially present;

g. The Court erroneously failed to certify the question of wrongful termination to the Colorado Supreme Court when requested by the Plaintiff although said questions were questions of first impression under the facts as set forth in this case;

h. The Court erroneously misapplied the facts and law both on Plaintiff's motion for reconsideration of the granting of partial summary judgment and Plaintiff's motion for reinstatement of claims both of which were filed prior to the trial;

i. The Court erroneously precluded Plaintiff from introducing Exhibits 14, 15 adn 170 relating to Becton Dickinson termination procedures and back dating of termination procedures following Plaintiff's termination, despite

Plaintiff's offer of proof and demonstration as to character evidence and evidence as to intent of Defendants in dealing with employees.

j. The Court erroneously precluded Plaintiff's introduction of Exhibits 39, 95, 102 and 124 relating to evaluations of the Plaintiff during the course of employment despite said evaluations being offered to rebut claims and testimony by the Defendant that Plaintiff was a chronic complainer, did not get along with supervisors and other information relating to Plaintiff's character;

k. The Court erroneously precluded the introduction of Exhibits 165 and 168 on the grounds of relevancy relating to the termination of Joseph Budinich (165) and Mr. Budinich's response (168), despite the fact that the question of waiver and propensity of Plaintiff to complain was affirmatively raised by the Defendants in pleading and in trial, and these letters demonstrated the nature and character of actions by the Defendants with Plaintiff in dealing with one another on this issue;

l. The Court erroneously precluded the question of punitive damages to be given to the jury and further erroneously precluded Exhibit 194 the 1981 annual report of Becton Dickinson from being introduced into evidence;

m. The Court erroneously precluded Plaintiff from introducing Exhibit 303, the letter from John McStravick to Interface dated 3/15/78 demonstrating the business and financial arrangements between the Defendant and their government consulting firm, when said evidence was offered for the purpose of demonstrating the relationship immediately after the Nasa procurement and the knowledge that Defendant would be paying substantial commissions on further government contract work;

n. The Court erroneously provided the jury a instruction, number 18, on independent investigation when there was no record of any evidence of any independent investigation;

o. The Court erroneously instructed the jury on waiver. Instruction number 19, did not conform to the existing case law and facts relating to waiver adduced through hearing, and did not comply with the standard jury instruction;

p. The Court erroneously provided an instruction on implied contract not in accordance with case law and the facts. This specific objection to instruction 20 relates to the Court's mistatement of the implied contract theory;

q. The Court erroneously gave jury instruction number 22 in that its limited recovery to a rate compensation applicable to sales made before termination;

r. The Court erroneously failed to give jury instructions tendered by the Plaintiff, instructions 1 through 8, and a package of instructions which the Court delinated as instructions 9 with subletters that were tendered at a prior trial.

For the foregoing reasons individually and inclusively Plaintiff request that for a new trial, and that a judgment or relief from judgment or order be entered in this proceeding as set forth herein.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR ATTORNEYS FEES DATED APRIL 2, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich pursuant to C.R.S. 1973, 8-4-114 hereby moves this Court to award attorneys fees as part of the costs of this action. As grounds for this motion Plaintiff will show the Court as follows:

1. Plaintiff initiated this action to recover certain commissions not paid the Plaintiff relating to the sale of certian propellant vapor detector equipment.

2. Plaintiff has been successful in obtaining a judgment relating to one or more of the commissions alleged not to have been paid by the Defendant.

3. C.R.S. 1973, 8-4-114 authorizes Plaintiff to recover attorneys fees as costs where he obtained a judgment for unpaid wages.

4. Unpaid wages are both salary wages or commission wages.

5. Plaintiff has filed with his Bill of Costs a statement as to the attorneys fees incurred prosecuting this matter and an Affidavit relating to the reasonable value of services provided copies of which are attached to this motion.

6. Plaintiff requests that this Court award to the Plaintiff attorneys fees reasonably incurred in the prosecution of this matter to a successful conclusion and judgment.

7. Plaintiff believes that a reasonable attorneys fees award of $52,198.00 is justified based upon an hourly rate of $90.00 per hour for all work done in calendar years 1981, 1982 and 1983 and $100.00 per hour for all work done in calendar year 1984.

[Signature and Certificate of Mailing omitted in printing]

AMENDED MOTION FOR NEW TRIAL, AMENDMENT OF JUDGMENT, RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure hereby moves this Court for a New Trial, Amendment of Judgment and Relief from Amendment of Judgment or Order as grounds for filing this amended motion Plaintiff would show the Court as follows:

1. This matter was tried during the week of March 19, 1984 and a jury verdict entered March 23, 1984.

2. On March 26, 1984 the Judgment Order entered and was mailed to legal counsel on March 26, 1984, invoking mailing time.

3. The Judgment entered in this proceeding provides for no interest prior to judgment.

4. Plaintiff in this matter is entitled to prejudgment interests from the date the compensation was due or minimally from the date the Amended Complaint in this proceeding was filed.

5. C.R.S. 1973, 8-4-101 et. seq. and specifically C.R.S. 8-4-104 requires that payment be made when the wages are due. This statute controls the operation and running of interest because of its remedial nature and requirement that payment be made when the compensation is fully earned.

Plaintiff requests that the Court additionally correct the judgment entered by the Clerk to accurately calculate the running of interest from either February, 1982 or June, 1982.

Plaintiff additionally incorporates by reference all previous grounds raised in the original Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order and Motion for Attorneys Fees and in no way waives any of the grounds either singularly or cumulatively as presented in the prior Motions and Bill of Costs submittals.

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL; AMENDMENT OF JUDGMENT; RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich submits this Memorandum in support of his Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order and in support of his Application.

Plaintiff, Joseph Budinich has previously filed with this Court substantial Memorandums and Briefs relating to the various issued decided by the Court on Summary Judgment. In that some of these same issues are raised in Motion for New Trial Plaintiff incorporates by reference all previous Briefs and Memorandums submitted to the Court covering those issues. In addition Plaintiff without waiving any rights or arguments desires to bring before the Court certain other points of law applicable to the Motion for New Trial; Amendment of Judgment; Relief from Judgment or Order.

I. THE COURT HAS MISAPPLIED THE LAW IN THE STATE OF COLORADO ON COMMISSIONS.

The Court in its Summary Judgment Order of May 31, 1983 finds under the principles set out in Lampe v. Presbyterian Medical Center 590 P.2d 513, 514 (Col. App. 1978), that Plaintiff's employment as a matter of law was one being terminable at will. Plaintiff contests this legal finding by the Court based on the employee handbook, which Plaintiff believes was applicable throughout his employment. However, assuming for the sake of argument that this finding is correct, the fallacy of the Court's logic is contained within its next statement that an employment contract that is terminable at will is also modifiable at will; the modification having an effect of terminating the existing contract and substituting in its place a new contract with modified terms.

The innacuracy of the Court's May 31, 1983 statement is obvious when one examines the provisions of C.R.S. 1973, 8-4-101 et seq. and case law decided thereunder. Commissions, like those in the instant case clearly fall within the statutory and remedial prescriptions of 8-4-101 et seq. Specifically, 8-4-101(9) contemplates commission payments as being such a covered item. The case that most effectively established this principal and which has been repeatedly relied upon is Hofer v. Polly Little Realtors, Inc., 534 P.2d 114 (Colo. App., 1975). In Hofer the Court made it clearly held that an employee could not be deprived of a large commission on a transaction which had not closed through the employers termination of the employer/employee relationship. The exact words were:

> "Yet after the closing was held, Plaintiff and Intervenor had a claim against their employer for wages (which term includes commissions under Section 8-4-101(9)) for services fully earned and unpaid under Section 8-4-104. Any other interpretation would lead to the patently unjust result that salesmen employed on a commission basis could be terminated with impunity prior to a closing and thus deprived of large commissions obtained through for their employers as a result of their effort." (emphasis added)

The logical deductive process tells us that if an employer cannot terminate to prevent the collection of commissions, that he also cannot modify the contractural agreement and arrangement, whether or not a terminable at will situation exists. This is exactly what the Court of Appeals determined in Brogan v. Bill Eagers Motors, Inc., 561 P.2d 377 (Colo. App. 1977). Utilizing the logic and rationale established in Hofer, the Court extended by law the principal of protecting commissioned salesmen stating:

> "However here the dispute arose because the employer, for his own purposes attempted to modify unilaterally the contractural agreement and imposed a new condition (liquidation before determination of profit). As the Louisiana Appellate Court stated in a case construing a similar statute, "We do not think the statute permits the employers desires,

> conveniences or procedures to condition the payment of wages." Duhon v. Prof Erny's Music Co., supra. Brogan at 388.

Thus by 1977 the principal that the employer cannot unilaterally modify a commission schedule where the transaction is underway or substantially completed was firmly established in the State of Colorado. There is no case in the State of Colorado contradicting the principal, except for the Court's erroneous conclusions contained in its Order of May 31, 1983.

Plaintiff submits that the Court's holding regarding modification of the commission schedule, where substantial performance was completed or alleged to have been completed is inconsistent with Colorado law, Colorado principals of equity and fairness and Colorado statutory interpretation.

II. THE COURT ERRONEOUSLY SUMMARILY JUDGED THE QUESTION OF WAIVER

The Court in its Order of May 31, 1983 found that as a matter of law Plaintiff waived his right to the initial commissions under the original schedule in that Plaintiff continued employment and accepted full salary and commissions based on the modified scheduel. The Court further found that although Plaintiff voiced his disapproval of the modified schedule prior to adoption there is no evidence whatsoever to indicate that he ever objected to the schedule once adopted or refused to accept commissions under a new schedule.

Waiver is an affirmative defense that must be proved by the party raising it. Here the Defendants have raised the Doctrine of Waiver. Any fact demonstrating waiver had not occurred was sufficient to put that matter at issue. The Court in its findings of May 31, 1983 specifically overlooks the stipulated Pre-Trial Order entered between the parties and made the Order of the Court on December 14, 1982. In that Order, which was subsequently reaffirmed in the Amended Pre-Trial Order, paragraph 14 states and admits that "prior to and subsequent to October 1, 1979 Plaintiff and

Mr. McStravick discussed the modification of the commission plan." See page 9 of the PreTrial Order. Further, the Court has overlooked the affidavit in support of Plaintiff's Motion for Summary Judgment and in opposition to Defendant's Motion for Summary Judgment. That affidavit specifically states as follows:

> "Thereafter, the company implemented a change in the commission plan and implemented a large order category with a maximum of $10,000.00 commission for any single order. At no time did I consent to the modification of the plan. I discussed the plan with other regional managers, some of whom also found fault in the plan. Thereafter I wrote John McStravick about the modification in the commission plan. John responded by telling me that I could be fired from my letter. Subsequently, I raised the issue on several other occasions prior to receiving any compensation on the sale of equipment. After not securing any sign of cooperation from the company to resolve this matter I employed legal counsel who wrote John McStravick."

The affidavit submitted by the Plaintiff establishes the communications and discussions subsequent to the change of the plan which affirmatively defeats waiver. Even if the Court believes the affidavit is ambiguous, such creates a question of fact as to the nature and extent of the communications which only a finder of fact can determine.

Further, the Court's determination of waiver flies in the face of Mr. McStravick's deposition testimony which was included within the material filed with the Court relating to Summary Judgment. Specifically on pages 142 and 143, Mr. McStravick testifies as to Mr. Budinich's complaints after the change in commission schedule. Mr. McStravick expressly states that he received a letter from Joe Budinich after the change of commission schedule and became greatly upset at the letter. Mr. McStravick testifies he felt Mr. Budinich's letter of October 22, 1979 was in complete contrast to any agreement relating to changing the commission schedule. Mr. McStravick further indicates that he was aware in both Mr. Budinich's letters that Mr. Budinich

had strong reservations about the change in commission plans.

The Court is additionally wrong in its finding of waiver based on the fact that Mr. Budinich receive compensation under the modified large bonus plan or modified commission plan. The facts in the case are clear and no evidence exists in the record that any large order bonus was paid to Joe Budinich during employment except for $7,000.00 in July, 1981 relating to the sale of the equipment in question. The receipt of that monies is not waiver under Colorado law. C.R.S. 1973, 8-4-110 specifically provides in case of a dispute over wages, the employer shall pay without condition and within the time set by this article all wages or parts of wages conceded by him to be due leaving to the employee all remedies he might otherwise be entitled to as to any balance he may claim.

The Court can certainly not say as a matter of law waiver occurred, where the undisputed amount of $7,000.00 was paid in late July, 1981, Plaintiff continued to orally protest the payment thereafter, and in November, 1981 the Defendant corporation was notified in writing of the dispute and the amounts in dispute.

The Court's conclusion is obviously incorrect. If waiver occurred it is only by operation of fact, not law in this State. Colorado has a higher regard for the protection of employees and the standard utilized by the Court.

III. THE COURT ERRONEOUSLY MADE EVIDENTIARY RULINGS AND EXCLUDED TRIAL EXHIBITS IN THIS PROCEEDING

The Court precluded Plaintiff from inquiring into and introducing Exhibits 14, 15 and 170 relating to terminations procedures and backdating of terminations procedures, despite Plaintiff's offer of proof that the actions of Defendants was impeachment testimony and was also being introduced as character evidence and evidence of intent on propensity to client as the question of Defendant's honesty and integrity were expressly before the jury pertaining to questions of fraud and deceit. Defendants within this litigation both in Pre-Trial Statements, Pre-Trial Order and evidence introduced claimed a

good faith and honest basis for termination of Plaintiff. Further these Defendants indicated their good faith behavior toward employees in modifying the commission schedules and their manner of payment.

Plaintiff was entitled to attack these positions and impeach the Defendants by direct and circumstantial evidence of bad faith dealings. Plaintiff in introducing 14, 15 and 170 expressly directed those Exhibits toward the good faith intent issues and propensity issues. The Court's preclusion of this testimony is contrary to Rule 404, 405(b) and 406. For intent question see United States v. Preston, 632 F. 2d 1285 (10th Cir. 1980). For plan or scheme see United States v. Beauthume, 527 F. 2d 696 (10th Cir. 1975), cert. den. 425 U.S. 996. For previous positions see United States v. Bramble, 641 F. 2d 681 (9th Cir. 1981); for rebuttal see United States v. Johnson, 634 F. 2d 735 (4th Cir. 1980).

The Court additionally erroneously precluded other exhibits in this proceeding including exhibits 39, 95, 102 and 124 relating to evaluations of the Plaintiff during the course of employment. These exhibits were not tendered for any purpose relating to termination, but were specifically tendered to rebut claims and testimony of the Defendant that Plaintiff was a chronic complainer, did not get along with supervisors, and other information relating to Plaintiff's character, that was put into testimony and evidence by Defendant's agents, McStravick and Bogazyck. This testimony was proper rebuttal testimony and directly applicable on questions of waiver and business relationship between the parties. Rule 405(a) and (b) specifically permits such inquiries regarding character. Since Defendants put into question the Plaintiff's character the rules specifically allow inquiry into relevant and specific instances of conduct as well as general opinion evidence. The evaluations contained rebuttal opinions by McStravick and Bogazyck in evaluating Plaintiff's character. They are both evidence of good character and ability to work with supervisors and fellow employees, as well as impeachment evidence relevant to discrediting the testimony of Bogazyck and McStravick. See Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L Ed. 168 (1948).

The Court similarly erred in its preclusion of exhibits 165 and 168. Inherent within the question of waiver is the business relationship maintained by the parties. Plaintiff's intended use of exhibits 165 and 168 demonstrate the manner in which Joseph Budinich would protest decisions contrary to his likings. These exhibits were germaine as to plan or scheme, and predisposition. The mere fact that the documents go into the termination situation is not in itself the basis for preclusion.

IV. THE COURT ERRONEOUSLY INSTRUCTED THE JURY IN THIS CASE

The Court erroneously instructed the jury in this case. The instructions given to the jury which were erroneous were material and directly related to claims in which the jury found for the Defendant.

The initial improper instruction was instruction number 18. In that instruction the Court provided an instruction parallel to Colorado Jury Instruction 19:11 Reliance After Investigation. The notes specifically point out that the instruction should not be used when there is no evidence in the case that Plaintiff made his own investigation or examination. In this proceeding no evidence existed that Plaintiff made any investigation into the compensation commission schedule. The evidence was uncontradicted that Plaintiff relied solely on the information provided by Mr. McStravick. Providing instruction 18 was incorrect and prejudicial and is a basis for reversal.

The Court's instruction number 19 is an instruction on waiver. The Plaintiff's objection relates to the instruction in total and to the second portion of the instruction. That portion of the instruction reads "Nonetheless, with full knowledge of the fact this commission would be limited to $10,000.00 Mr. Budinich continued to work on the sale of PVD equipment to the United States Air Force when a reasonable person under the same or similar circumstances would not have done so." Plaintiff submits that the Court should not have given a waiver instruction in the instant case, because of the controlling case law cited above relating to commission and wages.

Alternatively, Plaintiff submits that if a waiver instruction were appropriate that the language should have only been the language contained in the model jury instruction.

The Plaintiff further submits that instruction 20 was erroneous. Instruction number 20 given by the Court does not comport with the model instruction and additionally is a mistatement of the law on commissions.

By not specifically addressing any items listed in the Motion for a New Trial, Plaintiff does not waive those objections or issues for purposes of the Motion or Appeal.

WHEREFORE, Plaintiff requests that this Court grant Plaintiff's Motion for New Trial; Amendment of Judgment; and Relief from Order.

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR NEW TRIAL; AMENDMENT OF JUDGMENT; RELIEF FROM JUDGMENT OR ORDER DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, Joseph Budinich submits this Memorandum dealing solely with the question of the operation of interest on the $5,000.00 Judgment entered in this proceeding. This Memorandum is submitted to clarify the question of interest on the implied contract claim for the 79 PVD units.

C.R.S. 1973, 8-4-101 defines "wages" or "compensation" to mean all amounts for labor or services performed by employeed whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor of services performed in a contract, sub-contract, partnership, subpartnership, station plan or other agreement for the performance of labor services, if the labor of services to be paid is performed personally by the person demanding payment. The application of C.R.S. 1973, 8-4-101 et seq. has been specifically applied to commission situations similar to the 79 PVD order for which Plaintiff recovered judgment.

In the case of Hofer v. Polly Little Realtors, Inc., 543 P.2d 114 (Colo. App. 1975) Colorado Court of Appeals specifically found the wording of Section 8-4-104(1) provides for immediate payment of wages or compensation for labor or services earned and unpaid at a time of discharging an employee by an employer. Hofer at 117, The Court of Appeals stated:

> "Section 8-4-104(2) however, speaks to the situation. It states that at the time that employment relationship is severed, an employer need not immediately compensation not yet fully earned under a compensation agreement. The implication is clear that such wages become immediately due at the time they are fully earned."

The Court of Appeals in Hofer further went on to say that the wages were payable upon the completed sale of the property. In the instant matter the analogy is the same, that the wages were immediately payable upon receipt of the official government contract in February, 1982. Minimally, commissions were payable at the time demand was made for the commission by the Plaintiff Joseph Budinich in the Amended Complaint filed in June of 1982.

Similarly, treatment of interest is dictated by the remedial nature of C.R.S. 1973, 8-4-101 et seq. See Hartman v. Friedman, 591 P.2d 1318, 1321 (Colo. 1979).

[Signature and Certificate of Mailing omitted in printing]

MEMORANDUM IN SUPPORT OF ATTORNEYS FEES AS COSTS DATED APRIL 6, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Joseph Budinich has filed with the Clerk of the District Court his Bill of Costs. An item in this Bill of Costs relates to the payment of attorneys fees. The right to attorneys fees as a cost item is found within C.R.S. 1973, 8-4-114. The heading of this section is entitled "Employee May Recover Attorney Fees." This section specifically provides for inclusion of attorneys fees as costs in securing the judgment against the Defendant.

The Colorado Supreme Court has laid out an eight prong test in examining reasonable attorneys fees. Mau v. E.P.H. Corp., 638 P.2d 777 (1981). The factors to be considered are:

1. Time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

2. The likelihood, if apparent to the client, that acceptance of a particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation and ability of the lawyer or the lawyers performing the services.

8. Whether the fee is fixed or contingent.

In that the instant action is a diversity proceeding, it is submitted that the Mau criteria are proper criteria for evaluating attorneys fees in the instant case.

The alternative criteria established in Mau would be the Federal criteria set forth in Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Johnson v. Georgia Highways Express, Inc., 488 F.2d 714 (5th Cir. 1974). These cases examined attorneys under the Federal Civil Rights Act, 42 USC 1988. Those

cases utilize criteria similar to that espoused in Mau.

The Supreme Court in the decision of Hartman v. Friedman, 591 P.2d 1318 (1978) established the principal that in awarding attorneys fees the award must be reasonable. The Court however went on to say that the determination of reasonableness is a question of fact based on a variety of criteria. The fact that the award of attorneys fees may be 100% of the judgment or in excess of 50% of the judgment or in excess of the judgment itself is not a relevant factor. The social policy involved of insuring that employees receive compensation when due is the controlling criteria under Colorado law. See Hartman v. Friedman, supra at 1321 and 1322.

Utilizing the criteria established in Mau it is apparent that a sizeable recovery in attorneys fees is appropriate in the instant case. The controlling factors involve the state statute that mandates payment of compensation when due; the extensive time expended in the discovery stages of this litigation; two trials and the preclusion of other work because of the case. Additionally, the Court should consider the other factors enumerated in Mau.

In making these considerations the Court should consider the fact that Defendant declined to produce the majority of information in the State of Colorado. Plaintiff's counsel was required to twice travel to the State of New York for the purposes of conducting discovery with documents and taking depositions. Further, Plaintiff's counsel was required to travel to the States of Florida, Illinois and Utah for the purposes of taking depositions to preserve testimony and obtaining substantial background information.

The difficulties created by distance in this matter impose other considerations which warrant a large attorneys fee award.

The fact that this case was taken on a contingent fee basis does not mitigate or detract from the expenditures, complexity, difficulty and time imposition problems posed by the litigation. Of course, these factors must all be considered by the Court.

In order that the Court better evaluate the attorneys background counsel

has submitted with this Memorandum an attorney affidavit regarding his background and training.

[Signature and Certificate of Mailing omitted in printing]

MOTION TO REVIEW TAXATION OF COSTS DATED APRIL 13, 1984 FILED BY PLAINTIFF IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, by and through his attorney, hereby moves the Court for review of taxation of costs in this matter. As grounds for this Motion Plaintiff would show the following:

1. Plaintiff in this matter timely filed its Bill of Costs. A copy of that Bill of Costs is attached to this pleading and incorporated herein.

2. On April 10, 1984, Plaintiff through legal counsel appeared before the Clerk of the District Court for taxation of the Bill of Costs as submitted.

3. Counsel for Defendant Becton Dickinson and Company was present.

4. The Clerk of the District Court upon application of the Plaintiff for taxing costs refused to tax any of Plaintiff's costs without Order of the Court.

5. The Clerk of the Court indicated that with approval of this Court it would tax certain costs, appearing on Plaintiff's Bill of Costs, but needed such an Order before proceeding. The costs the Clerk of the District Court indicated that were appropriate taxable costs upon Order of the Court were:

   a. Fees of the Clerk.
   b. Fees for Service of Summons.
   c. Depositions used for substantive testimony appearing in Attachment A.
   d. Certain witness and service fees appearing in Attachment B.
   e. Certain fees appearing in Attachment E.

6. Plaintiff's cost as indicated above are applicable and appropriate fees and costs that are taxable in this matter pursuant to C.R.S. 1973, 8-4-101 et. seq., and the Federal Rules of Civil Procedure.

7. Further, Plaintiff submits that the other costs submitted int he Bill of Costs are true and appropriate costs for taxing in this action.

8. The Clerk of the Court on the aforementioned date taxed costs in the amount of $1,410.00 against the Plaintiff in this action. This taxation was done pursuant to Rule 68, of the Federal Rules of Civil Procedure, although Defendant's Motion to Tax Costs pursuant to Rule 68 is still pending with the Court.

9. Plaintiff objects to the taxing of costs pursuant to Rule 68, based on his response to Defendant's Motion to Tax, which response is incorporated herein.

10. Further, Plaintiff objects to any taxation of costs in this proceeding in that Defendant failed to file any Motion for New Trial, Amendment of Judgment, Relief from Judgment or Orders.

11. This Court should remand to the Clerk of the Court the question of taxation of costs as permitted under Colorado Statute, C.R.S. 1973, 8-4-101 et. seq. and under the Federal Rules of Civil Procedure, and appropriate case law.

WHEREFORE, Plaintiff requests that this Court Order the question of taxation of cost be remanded to the Clerk of the Court for taxation of Plaintiff's costs, and further that the Court disallow taxation of costs to the Defendant, pursuant to Rule 68, Federal Rules of Civil Procedure.

[Signature and Certificate of Mailing omitted in printing]

MOTION FOR AMENDMENT OF ORDER OR, RELIEF FROM JUDGMENT AND ORDER DATED JULY 13, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, by and through his attorney, hereby moves this Court to amend, modify and alter its Order of July 3, 1984 awarding Plaintiff $1,000.00 in attorney fees. As grounds for this Motion, Plaintiff would show the Court as follows:

1. The Court Order of July 3, 1984 is entered without finding specific facts and basis as to the manner and means in which the attorney fees of $1,000.00 was awarded.

2. The July 3, 1984 Order is arbitrary, capricious and without factual and legal basis.

3. The July 3, 1984 Order is erroneous and is a wrongful penalty imposed upon the Plaintiff.

4. The July 3, 1984 Order does not adequately apply the required criteria of Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981) Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

5. The July 3, 1984 Order was entered without an opportunity for Plaintiff to respond to Defendant's position, as requested by Plaintiff.

6. The Court Order effectively awards less than 12 hours of attorney time regarding the litigation and can not be justified under any circumstances.

7. The Court's Order does not accurately analyze Defendant's offer of judgment.

8. The Court awarding costs of Defendant is incorrect.

WHEREFORE, Plaintiff requests that this Court amend, modify and alter the Order and appropriately award attorney fees pursuant to criteria of Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981)' Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 F. Ct. 1933 (1983).

MEMORANDUM IN SUPPORT OF MOTION FOR AMENDMENT OF ORDER OR, RELIEF FROM JUDGMENT AND ORDER DATED JULY 13, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

Plaintiff, in support of its Motion For Amendment of Order or, Relief from Judgment and Order dated July 3, 1984 submits this Memorandum.

I. BACKGROUND

On March 23, 1984 a Federal jury returned a verdict in favor of the Plaintiff relating to owed commissions on the sale of 79 P.V.D. Units to the Air Force. The jury's verdict was a maximum verdict under the Court's instruction to the jury. Pursuant to this verdict, Plaintiff's counsel filed a Motion For Attorney Fees pursuant to C.R.S. 1973, 8-4-114. Defendant opposed this Motion arguing that C.R.S. 1973, 8-4-114 was not applicable to claims in implied contract. The Court on May 14, 1984 granted the Motion For Attorney Fees and directed that Plaintiff submit a statement and all documentation pursuant to the proportionate recovery rule.

Pursuant to Court Order, Plaintiff submitted its statement and supporting material. Thereafter, Defendant submitted its reply. Plaintiff moved to reply to Defendant's position but prior to ruling on this request, the Court entered its July 3, 194 Order awarding Plaintiff $1,000.00 in attorney fees.

II. THE COURT'S JULY 3, 1984 ORDER LACKS SUFFICIENT FINDINGS OF FACTS

This Court over a ten year period has often ruled on attorney fee questions. The Court's rulings have traditionally been thorough and exhaustive setting forth specific factual determination requests to determine appropriate

attorney fees. The instant Order fails to make such factual determinations and is defective under the applicable criteria established in Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980) and Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

The Court failed to state how it made the $1,000.00 determination. The award is just announced. It does not reflect an hourly rate basis, nor is it limited to a contingent fee rationale. The award is an arbitrary figure selected by the Court.

No justification exists to select an arbitrary figure for compensation in that Plaintiff submitted affidavits as to the actual hourly rate of $90.00 per hour for all work done in calendar years 1981, 1982 and 1983 and $100.00 per hour for all work done in calendar year 1984. These figures were uncontested by Defendant and no counter affidavit was filed. The Court inappropriately failed to find that a rate of $90.00 per hour was the controlling rate for Plaintiff's work.

The Court further failed to factually determine the hours it would allow Plaintiff for work performed that was directly related to Plaintiff's claim, despite Plaintiff's detailed analysis of the time elements. At best, the Court merely discusses some categories it will not allow, but makes no determination what it did allow and what should be discounted.

The only evidence before the Court as to the allowable time is Plaintiff's submittal. This submittal shows that prior to offer of judgment, based on a $90.00 per hour figure, Plaintiff should recover $11,491.74. Defendants provided the Court no mathematically justifiable calculation to the contrary.

The Court in its Order at best indicates that it would disallow some costs for travel time and discovery of unrelated witnesses. It is a correct assessment, any reduction from the pre-offer of judgment would produce a figure substantially greater than the $1,000.00 awarded.

As an example of the Court's failure to make specific factual findings leading to erroneous conclusions, the Court fails to determine exactly what amount of travel time was included in calculating the amount due before offer

of judgment. The Defendant told the Court that approximately 47 hours of time was included, but this in fact is inaccurate. Although Plaintiff may have spend 47 hours traveling, less than 12 hours are considered allocable toward this claim. All other travel time was not considered. This means that even if the Court excludes all twelve hours, although clearly some hours should be credited for the time spent doing discovery with Defendant's employees and Lamar Carpenter, a deduction of only $1,080.00 would be in order.

Simularly, if the Court were to discount all time allocated to discovery with Dr. Stetter, Thomas Meeks, Steve Prince, Ralph Wingo and Cal Thorp, the total time is less than five hours as prorated by Plaintiff, including travel time which the Court has previously deducted. The actual time remaining after travel time is approximately 2 hours, or $180.00.

The Court is thus left with over $9,000 of allowable attorney fees that is reduced to $1,000.00.

The Court's Order is silent on how it reached the figure of $1,000.00. The Order makes no determination of what was the reasonable allowable fee for discovering essential and critical documents on 79 P.V.D. orders that were only produced in New York State, for the taking of Lamar Carpenter's deposition that was read into the record as testimony clearly indicating that the sale of the 79 P.V.D. Units completed the Plaintiff's last day of employment; for representing Mr. Budinich while his deposition was taken on two occasions; for assembly of all relevant documents on the second P.V.D. sale; for deposing Charles Curry on the second P.V.D. Sale; for deposing Mr. McStravick on company policy relating to payment of commissions on large sale orders; and for trying this case to a jury.

Without such a factual analysis, this Court's Order is without a sufficient basis and is in error.

III. THE COURT'S AWARD OF $1,000.000 IS A PENALTY AND THEREFORE IMPROPER

The Court's Order awarding $1,000.00 in attorney fees serves as a penalty and is contrary to the legislative intent of 8-4-101, et. seq. As pointedly set

out by the Colorado Supreme Court in the case of Hartman v. Friedman, 591 P.2d 1318 (1978), the social policy of awarding reasonable attorney fees to a prevailing Plaintiff in a wage case is to insure that employers pay wages when due. The Court's award in this case clearly circumvents that social policy, particularly where this Defendant has engaged in a militant defense. See Perkins v. New Orleans Athletic Club, 427 F. Supp. 661 (D.C. of E.D.L.A., 1976).

This Court's token award of attorney fees is punitive. Rejection of an offer of judgment has its own sanctions. No justification exists in rule or law for supplemental punishment by reduction of already earned attorney fees.

Plaintiff requests the Court to re-examine the records and manner of fee determination and to award the fees actually earned.

IV. CONCLUSION

This Court has submitted substantial error in its Order of July 3, 1984. Plaintiff submits that this Court should vacate the Order, allow Plaintiff to file a reply and point out to the Court the obvious inaccuracies of Defendant's position and enter an appropriate Order relating to attorney fees.

[Signature and Certificate of Mailing omitted in printing]

NOTICE OF APPEAL DATED AUGUST 28, 1984 FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Caption omitted in printing]

NOTICE IS HEREBY GIVEN that the Plaintiff above named hereby appeals to the United States Court of Appeals for the 10th Circuit, from this Court's Order entered May 14, 1984 denying Plaintiff's Motion for New Trial, Amendment of Judgment, Relief from Judgment or Order and this Court's Order entered August 1, 1984 denying Plaintiff's Motion for Amendment of Order or Relief from Judgment and Order.

[Signature and Certificate of Mailing omitted in printing]

Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-283

In The

Supreme Court of the United States

OCTOBER TERM 1987

—o—

JOSEPH G. BUDINICH,

Petitioner,

vs.

BECTON DICKINSON AND COMPANY,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

—o—

BRIEF FOR PETITIONER

—o—

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December 11, 1987

QUESTION PRESENTED

Whether the Court's holding in *White v. New Hampshire*, 445 U.S. 445 (1982), that an award of attorney's fees under a federal statute is an ancillary part of the proceeding, applies to diversity action cases where state law, like Colorado's, provides that attorney's fees are a substantive part of the relief; or whether State substantive law is controlling because of the principles announced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

And whether, if *White v. New Hampshire* is controlling, the decision in this case should be considered new law relating to diversity cases and only have prospective application.

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No. 87-283

—o—

In The

Supreme Court of the United States

OCTOBER TERM 1987

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JOSEPH G. BUDINICH,

Petitioner,

vs.

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—o—

On Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

—o—

BRIEF FOR PETITIONER

—o—

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 807 F.2d 155 and reprinted beginning at Page 14 of the Petition For Writ of Certiorari ("P.W.C.").

The May 17, 1984 Order of the District Court for the District of Colorado relating to post trial motions which is not reported, is reproduced at P.W.C., Pages 32 through 45. The July 3, 1984 Supplemental Order of the District Court for the District of Colorado relating to post trial motions, which is not reported, is reproduced at P.W.C., Pages 47 through 51. The August 1, 1984 Order of the District Court for the District of Colorado which is also not reported, is reproduced at P.W.C., Pages 53 and 54.

—o—

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered December 12, 1986. A timely Petition For Rehearing was denied on March 26, 1987 (P.W.C., Page 22).

The Petition For Writ of Certiorari was timely filed on July 14, 1987 after Associate Justice Byron R. White granted a Motion For Extension of Time to file the Petition For Writ of Certiorari. The Petition For Writ of Certiorari was granted by order of this Court on October 13, 1987.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

———————o———————

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTIONAL AMENDMENT 10. POWERS RESERVED TO THE STATES OR PEOPLE.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

ARTICLE IV, SECTION I. FULL FAITH AND CREDIT.

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

ARTICLE VI. CLAUSE 2 — SUPREME LAW.

> "The Constitution and the laws of the United States which shall be made in pursuance therof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound, thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding."

ARTICLE I, SECTION 8, CLAUSE 18. ALL NECESSARY AND PROPER LAWS.

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

———————o———————

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291. Final decisions of the district court.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292. Interlocutory decisions.

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order, Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1652. State laws as rule of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply.

28 U.S.C. § 2072. Rules of civil procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution [USCS Const. Amend. 7].

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

C.R.S. 8-4-114 (1973, Cumm. Supp. 1985). Employee may recover attorney fee.

Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

———————o———————

STATEMENT OF THE CASE

This matter centers on a dispute between the parties relating to commissions for the sale of certain vapor sensing equipment sold to the United States Air Force. The action was originally filed in the District Court in and for the City and County of Denver, State of Colorado. The Defendant, Becton Dickinson removed the action based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.

After the close of discovery, the Defendant Becton Dickinson moved for summary judgment arguing that a company could change its commission schedule at any time and the change was binding on its employees.

Plaintiff argued that the law of the State of Colorado required the company to honor commission terms for all orders received or orders in process. Plaintiff argued that the change was only valid prospectively. Plaintiff's argument was rejected by the United States District Court although being supported by Colorado case law.[1] (Order of May 31, 1983 District Court for the District of Colorado, P.W.C. at Pages 24 through 29. Certain claims were not dismissed, including a claim of fraud and second commission claim. The remaining claims were tried to a jury. The jury was unable to render a verdict and a mistrial was declared. Plaintiff moved for reinstatement of the claims summarily adjudged and the motion was denied. A second trial was held which resulted in Plaintiff's verdict for a second commission claim and a defense verdict for the fraud claim. P.W.C. at Page 31.

Plaintiff filed a Motion for Attorney Fees based on the fact that commission claims are claims for wages. Colorado mandates that attorney fees be included as part of the remedy. Joint Appendix ("J.E.") at Page 29. Additionally, Plaintiff moved for a new trial or amendment of judgment alleging multiple errors both at trial and in pretrial rulings, including the adjudication of the Motion for Summary Judgment. Reproduced in J.E. at Pages 24 through 28.

The Court in a single order granted an award of attorney fees, finding that such fees are not discretionary and must under Colorado law be included in the judgment, but left open the issue of the amount due; denied the Motion for new trial or amendment of judgment; and ordered Plaintiff to submit

1. Colorado case law supporting Plaintiff's position on commissions due includes *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App. 1975) and *Brogan v. Bill Eager Motors, Inc.*, 561 P.2d 377 (Colo. App. 1977). Additionally, the case of *Pittman v. Larson*, 724 Colo. 1379 (Ct. Appls. 1986) cert. denied Sept. 29, 1986 holds that summary judgment of the commission claim was erroneous under Colorado law.

detailed records and explanations to justify the attorney fee request while the matter was held in abeyance (May 17, 1984 order of District Court reproduced in P.W.C. at Pages 33 through 45). This was accomplished through a supplemental filing.

The Court thereafter entered a supplemental order awarding attorney fees (Order of July 3, 1984 of the District Court reproduced in P.W.C. at Pages 47 through 51).

Plaintiff filed an appeal in what he believed to be a timely fashion because the mandatory relief under Colorado law (Notice of Appeal reproduced in J.A. at Page 51.
in J.A. at Page 51.

Immediately after appeal the Defendant moved for summary disposition of the case on jurisdictional grounds relying on The Supreme Court decision of *White v. New Hampshire*, 455 U.S. 445 (1982).

The Court of Appeals required the respective parties to brief the jurisdictional issues before submitting briefs on the merits.

On December 12, 1986 the Tenth Circuit Court of Appeals ruled that it lacked jurisdiction to hear the appeal on the merits. Per Curiam opinion of the Tenth Circuit reproduced in P.W.C. at Pages 14 through 20. The Court of Appeals' decision that it lacked jurisdiction was based on *White*. The Court of Appeals found a need for a uniform and unqualified rule. In so ruling, the Court of Appeals found that Colorado substantive law as determined by Colorado Appellate Courts was irrelevant to its determination.[2] December 12, 1986 per curiam opinion, P.W.C. at Page 18).

2. Colorado's substantive law is that an attorney fee award is not ancillary to the underlying proceeding, but is an inherent part of the claim. *Ortega v. Board of County Commissioners*, 657 P.2d 989 (Colo. App. 1982) *cert denied*; *Ball Corporation v. Loran*, 42 Colo. App. 401, 596 P.2d 412 (Colo. App. 1979); Marietta v. Busto, 691 P.2d 345, 347 (Colo. App. 1984), cert. denied 105 S.Ct. 2024 (1985).

The Court of Appeals then held that the appeal was untimely filed since it was beyond the 30 day period prescribed by the governing federal rule of procedure.

Further, the Court of Appeals rejected Plaintiff's argument for nonretroactive application of the decision.

———————o———————

SUMMARY OF ARGUMENT

The Court in *White v. New Hampshire*, 455 U.S. 445 (1982) held that attorney fees under a federal statute, 42 U.S.C. § 1988, were collateral and separate to relief on the merits.

Since the decision focused on a federal attorney fee statute, the Court was unrestrained to determine the concept of claim finality for a federal cause of action.

This same freedom is not available when the underlying claim is based in state law and federal jurisdiction arises solely through diversity of citizenship pursuant to 28 U.S.C. § 1332.

Where the federal system exercises its authority pursuant to 28 U.S.C. § 1332 diversity jurisdiction, the mandate of the United States Constitution and 28 U.S.C.§ 1652 governs. The result is that state substantive law controls, whether enacted by the state legislature or determined by the state judiciary. *Erie v. Tompkins*, 304 U.S. 64 (1938).

The single limitation upon the *Erie* principle is where enactment of a Federal Rule of Procedure, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, controls the field and is deemed procedural, or the rule implicity controls the issue and does not abridge, enlarge or modify and substantive right. *Hanna v. Plumber*, 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Burlington Northern Railroad Co. v. Woods*, ____ U.S. ____, 55 L.W. 4173 (1987).

Colorado's substantive law relating to statutory attorney fees differs from this Court's pronouncement in *White*. By case law Colorado has established that attorney fees are not collateral or independent to the underlying claim, but are an integral part of the substantive relief. *Marietta v. Busto*, 691 P.2d 345, 347 (Colo. App., 1984), cert. denied, 105 S.Ct. 2024 (1985); *Ortega v. Board of County Comm.*, 657 P.2d 989 (Colo. App., 1982), cert. denied, (Colo. Supreme Ct. 1983); *Ball Corp. v. Loran*, 42 Colo. App. 401, 596 P.2d 412 (Colo. Appl., 1979).

The substantive determination by Colorado, although in conflict with the view of the White Court, is not invalidated by any Federal Rule enacted pursuant to 28 U.S.C. § 2072.

Without such enactment the Erie doctrine must control pursuant to Constitutional and statutory mandate. The federal courts therefore must acknowledge Colorado's sovereign determination of its own law that is clearly established in *Ortega* and *Marietta*.

———————o———————

ARGUMENT

I. THE APPLICATION OF *WHITE v. NEW HAMPSHIRE* IS LIMITED.

In *White* this Court resolved the issue of whether an attorney fee request pursuant to federal statute was a substantive part of the claim or was collateral to and separate from the merits in chief. The Court at 452-53, Note 14 stated:

> [T]he collateral character of the fee issue established that an outstanding fee question does not bar recognition of a merit judgment as 'final and appealable'.

Although the statement is clear on its face, the statement is premised upon the substantive determination that the attorney fee claim is collateral to the merits. It is implicit in *White* that the claim must be examined utilizing the substantive law of the entity enacting the law.

That examination was simple in *White* since the claim arose from the federal civil rights statutes. The Court had the constitutional and legislative freedom to either interpret prior precedent or establish new precedent pertaining to federal substantive claims.

Nearly all federal circuits have recognized that *White* established broad rules relating to federal claims. See *Schutz v. Crowley*, 802 F.2d 498 at 503 (D.C. Cir., 1986); *Ellender v. Schweiker*, 781 F.2d 314 (2nd Cir., 1986); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir., 1985); *McKee v. Bi-State Development Agency*, 801 F.2d 1014 (8th Cir., 1986).[3]

However, the freedom in determining substantive law that the Court exercised in White, supra does not exist relative to a claim founded in state law, that is in the federal forum through diversity jurisdiction. The United States Constitution, Amendment 10 and 28 U.S.C. § 1652, specifically mandates adherence to state substantive law. Erie, supra.

The mandate to apply state substantive law is absolute, unless a federal rule of procedure preempts the field or the federal rule implicitly controls the issues of law. Hanna, supra.; Armco Steel, Burlington Nothern Railroad Co.

The Burlington Northern Court at 4174 stated the test as follows:

> "The initial step is to determine whether when fairly construed, the scope of Federal Rule 38 is 'sufficiently broad' to casue a 'direct collision' with the state law, or implicitly, to 'control the issue' before the Court thereby leaving no room for the operation of trust law. [citations omitted]"

3. The Fifth Circuit and Eleventh Circuit have narrowed the interpretation and not applied it in a situation where the amount of the award was not determined. See *Rodriguez v. Handy*, 802 F.2d 817 at 821 (5th Cir. 1986) citing *Fort v. Roadway Express, Inc.*, 746 F.2d 744 (11th Cir. 1984).

This initial critical step was clearly omitted by the Tenth Circuit in its analysis of this case and is ultimately determinative to the issue presented here.

II. NO FEDERAL RULE OF PROCEDURE EXISTS THAT REQUIRES ATTORNEYS FEES BE TREATED AS A COLLATERAL ISSUE.

An examination of the opinion below by the Tenth Circuit [reproduced at P.W.C. 14 through 20] demonstrates that no federal rule of procedure causes a "direct collision" with state substantive law or "controls the issue." The Tenth Circuit's analysis is contained in one sentence [P.W.C., Page 18]:

> "The specification of the time for filing a notice of appeal from the judgment of a federal district court is clearly a question of federal procedure and as such is governed by federal law."

The statement is accurate, but insufficient. The Rules of Appellate Procedure, Rule 4 governs the time for appeal. Yet all orders are clearly not appealable. Rule 4 must be read in conjunction with 28 U.S.C. § 1291 and 28 U.S.C. § 1292. Since certification for appeal was never entered by the District Court, the issue is whether all aspects of the state claim had been adjudicated on the merits. An examination of the trial court's order (reproduced, P.W.C. at Page 33-45) demonstrates that the Court did not end the litigation, since the attorneys fee question was "held in abeyance" pending completion of a briefing schedule.

No definitive rule of procedure exists which specifies whether or not such an order terminates the litigation. Thus there is no "direct collision." Further, no federal rule implicitly "controls the issue" leaving room for the operation of state law. This is clearly demonstrated by the fact that the

Court had to decide *White*, and specifically determine what federal substantive law would be.

Under these circumstances the Court of Appeals was required to examine and utilize Colorado substantive law, *Erie*.

III. COLORADO SUBSTANTIVE LAW ON ATTORNEYS FEES IS THAT THEY ARE AN INHERENT PART OF THE RELIEF AND NOT COLLATERAL TO THE ACTION.

Colorado substantive law relating to attorneys fees differs from this Court's pronouncement in *White*. By case law Colorado established the principle that attorneys fees are not collateral or independent to the underlying claim, but are an integral part of the substantive relief. *Marietta; Ortega; Ball Corp.* The language of *Marietta* at Page 347 is extremely significant:

> "[T]he court had specifically reserved the issue of recoverability of plaintiff's attorney's fees. Until this matter was determined, the judgment was not final or appealable. *Ortega v. Board of County Comm.*, 657 P.2d 989 (Colo. App., 1982)." (emphasis added)

The decisions in *Ortega* and *Marietta* are the law of Colorado. They stand as clear and unrefuted precedent as to what the law is and was. Colorado law is that an award of attorneys fees is an inherent part of the relief and is not divisible from the underlying cause of action.

It is also noteworthy that both *Ortega* and *Marietta* were decided after the United States Supreme Court decision in *White v. New Hampshire*. The divergence of direction from the United States Supreme Court is intentional and results in the clear and unmistakable conclusion that Colorado law fundamentally and substantively differs from federal substantive law.

Colorado's substantive determination directly impacts on the concept of finality of claim. Under Colorado law a claim is not final and appealable until attorneys fees are fully determined. *Torrez v. Day*, 725 P.2d 1184 (Colo. App., 1986).

Appellant's claim for commissions was therefore not fully adjudicated until the trial court entered its determination on the amount of attorneys fees to be paid.

This interpretation is also reinforced by the intent of the labor law statute in question. In discussing C.R.S. 8-4-114, the Colorado Supreme Court specifically noted that attorneys fees in such cases were part of the remedy afforded to the successful employee as a means of deterring the employer. See *Hartman v. Freedman*, 591 P.2d 1318 (Colo., 1979).

Colorado Revised Statute, 8-4-114 specifically mandates that the judgment include a reasonable attorneys fee and the trial court found that requirement controlling. The District Court states in its May 17, 1984 order (reproduced at P.W.C., Page 40) as follows:

> "The Colorado Court of Appeals has explained that recovery of attorneys fees under C.R.S. 8-4-114 is a matter right..." (Citation omitted)
>
> and
>
> "Therefore, the court finds that plaintiff is entitled to an award of reasonable attorney fees with respect to the recovery of said wages pursuant to C.R.S. 8-4-114"

The District's Court's recognition that attorneys fees were part of the award under Colorado substantive law demonstrates that no final judgment occurred until the attorneys fee question was fully determined.

IV. IF WHITE APPLIES TO DIVERSITY CASES NEW LAW HAS BEEN ESTABLISHED.

In the event that this Court determines that *White* controls diversity claims new law has been established, which should be given only prospective application.

The need for such treatment is apparent since Colorado's law was unambiguous and was followed under the belief that it substantively controlled the diversity proceeding.

Neither this Court nor any Court of Appeals prior to the instant case examined and determined the *Erie* question, vis-a-vis *White*.

Since this Court's holding is clearly determinative as to law, its application should be prospective from the date the decision is rendered.

The rationale and criteria for prospective application are enumerated in *E.E.O.C. v. Gaddes*, 733 F.2d 1373 (10th Cir. 1984). All criteria and rationale are present here.

First, new substantive law or precedent would be established.

Second, Appellant has a meritorious appeal. The likelihood of success is substantial. The entry of summary judgment by the United States District Court below was clearly erroneous. Colorado's law expressly holds that an employer cannot unilaterally change a commission schedule in order to avoid the payment of substantial commissions. *Brogan v. Eager Motors, Inc.*, 561 P.2d 377 (Colo. App., 1977); *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App., 1975). Additionally in *Pittman v. Larson Distrib. Co.*, 724 Colo. 1379 (Ct. App. Colo., 1986) the Colorado Court of Appeals determined that summary adjudication of a dispute, like Appellant's was improper because of factual issues.

Additionally, Colorado law on wrongful discharge has been substantially clarified, since a handbook exception to the terminable at will doctrine has been recognized. *Salami v. Farmers Insurance Co.*, 684 P.2d 264 (Colo. App. 1984).

The third and last criterion is also present. Substantial inequities would occur if the holding was made retroactive. Appellant would be clearly injured. Also, appellants in the Eleventh and Fifth Circuit Court of Appeals would be harmed since those circuits have adopted a minority position relating to the attorneys fee finality issue.

The appropriate treatment is therefore prospective treatment, if Appellant is incorrect on the Erie doctrine.

———o———

CONCLUSION

The United States Court of Appeals for the Tenth Circuit incorrectly determined that it lacked jurisdiction in this proceeding. The Tenth Circuit's failure to recognize that *White* did not automatically apply to a case grounded in the substantive law of a state is fatal under *Erie*.

Furthermore, even assuming arguendo that *White* was deemed controlling, its application to diversity cases is a new standard never previously articulated. As a matter of fundamental fairness the appeal on the merits should be permitted.

WHEREFORE, Petitioner respectfully requests this Honorable Court to enter its order making the Writ final and remand this matter to the Tenth Circuit Court of Appeals mandating a review on the merits of the appeal.

Respectfully submitted,
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Dated this 11th day of December, 1987.

Supreme Court, U.S.
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No. 87-283

In The
Supreme Court of the United States
October Term, 1987

JOSEPH G. BUDINICH,
Petitioner,

v.

BECTON DICKINSON AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the time in which to appeal a judgment of the federal district court is governed by federal law and procedure?

2. Whether an appeal from a final judgment on the merits of an action is untimely when it is not filed within the time set by the Federal Rules of Appellate Procedure, where an order taxing attorneys' fees as costs of the action is pending?

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No. 87-283

In The
Supreme Court of the United States
October Term, 1987

JOSEPH G. BUDINICH,
Petitioner,

v.

BECTON DICKINSON AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent, Becton Dickinson and Company,[1] respectfully requests that this Court affirm the decision of the Court of Appeals for the Tenth Circuit.

[1]Becton Dickinson and Company is a publicly owned corporation. It has no subsidiaries other than wholly-owned subsidiaries. Becton Dickinson and Company has equity investments in the following companies: Applied Bio Systems, Inc.; Oncongene Science, Inc.; Quidel; Cell Analysis Systems, Inc.; and Alyx, Inc.

STATEMENT OF THE CASE

The issue before the Court is whether petitioner filed a timely notice of appeal from the judgment below. The case arose out of a dispute over the amount of commissions owed petitioner on sales made by respondent while petitioner served as respondent's western regional manager. In 1979, two years prior to the sales at issue, respondent had modified its commission structure applicable to employees at petitioner's level. Although petitioner initially protested this change in the commission structure, he continued employment with respondent. Petitioner was terminated from his position in November, 1981.

In February, 1982, petitioner commenced this action in a Colorado state court. The case was removed to the United States District Court for the District of Colorado on the basis of the diversity of citizenship between the parties.

Petitioner's amended complaint asserted claims for breach of an employment contract, quantum meruit, misrepresentation and outrageous conduct. (Joint Appendix ("J.A."), p. 5) The district court granted summary judgment in favor of respondent on the claims for breach of contract and outrageous conduct. (Petition for Writ of Certiorari ("Petition"), pp. 23-29) The remaining claims were tried before a jury in March, 1984. The jury found for respondent on the misrepresentation and implied contract claims, and awarded petitioner $5,000 on his quantum meruit claim, based on a post-termination supplemental purchase order. (Petition, p. 33) Petitioner did not raise a claim for attorneys' fees in the complaint or in any other

pleadings, and he presented no evidence at trial with respect to attorneys' fees.

The district court entered judgment on the verdict on March 26, 1984. (Petition, p. 31) The judgment awarded petitioner $5,000 and dismissed petitioner's remaining claims. On March 30, 1984, petitioner filed a bill of costs raising for the first time a claim for attorneys' fees under Colorado Revised Statutes ("C.R.S.") § 8-4-114, the Colorado Wage Claim Act. On April 2, 1984, petitioner filed a motion to amend the judgment pursuant to Fed.R.Civ.P. 59 and 60, in which he challenged various of the court's rulings at trial. (J.A., p. 24) That same day, petitioner filed a separate motion for attorneys' fees, requesting that fees be awarded "as part of the costs of this action" pursuant to the Colorado statute. (J.A., p. 29)

On May 14, 1984, the district court denied petitioner's original and amended motion to amend the judgment, and granted petitioner's motion for attorneys' fees, directing petitioner to file supporting documents in the event the parties were unable to agree upon the amount of a reasonable attorneys' fee. (Petition, pp. 33-45)

On July 3, 1984, the court entered an order awarding petitioner attorneys' fees in the amount of $1,000, "to be taxed as costs." (Petition, p. 48) Petitioner thereafter filed a motion for relief from the July 3, 1984 order (J. A., p. 46) which motion was denied on August 1, 1984. (Petition, pp. 53-54)

Petitioner filed his only notice of appeal on August 29, 1984, more than three months after the district court denied petitioner's Rule 59 motion. (J.A., p. 51) Respondent moved for summary dismissal of the appeal on the

ground that the thirty-day period to file the notice of appeal commenced on May 14, 1984, the date the district court disposed of the motion to amend the judgment. On December 12, 1986, the Court of Appeals for the Tenth Circuit granted respondent's motion for summary dismissal. An order of dismissal was entered as to all issues except the district court's determination of the amount of attorneys' fees, which was affirmed. (Petition, pp. 14-20) Petitioner filed a petition for rehearing, which was denied on March 26, 1987. (Petition, p. 22) This Court granted the Petition for Writ of Certiorari on October 13, 1987.

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SUMMARY OF ARGUMENT

1. The court of appeals correctly ruled that the timeliness of petitioner's appeal is a matter of federal procedure that is controlled by federal law. Petitioner's reliance on *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) overlooks the applicable federal rules and ignores the distinction between substance and procedure.

a. The federal rules of civil procedure and appellate procedure govern the finality of judgments and the timeliness of federal appeals. Fed. R. Civ. P. 58 reflects the policy that the entry of a judgment should not be delayed pending the award of costs to the prevailing party. The history of this provision suggests that the reference to costs was meant to encompass attorneys' fee awards where the relevant authority provides for such awards. *See Marek v. Chesny*, 473 U.S. 1, 8 (1985). Since the issue raised

by petitioner requires the interpretation and application of Fed. R. Civ. P. 58 and Fed. R. App. P. 4(a), there is no room for operation of a different set of state procedures intended to govern the finality and appealability of state court judgments. *See Burlington Northern R. Co. v. Woods*, 107 S. Ct. 967 (1987); *Hanna v. Plumer*, 380 U.S. 460 (1965).

b. The effect of a pending motion for attorneys' fees on the timeliness of a notice of appeal presents an issue of federal procedure, even if the issue were not controlled by the federal rules of procedure. Determining the timeliness of appeals in diversity cases in accordance with a consistent federal procedure will not encourage forum shopping, nor will it result in discrimination against residents of the forum state. There is nothing in *Erie* to suggest that in a diversity action either party should be entitled to follow the time limits for appeals in the state courts.

2. Under federal law, petitioner was required to file his notice of appeal within thirty days after the date on which the district court denied his Rule 59 motion to amend the judgment. Fed. R. App. P. 4(a)(1) and (4). This time period was not stayed by the pendency of his request for an award of attorneys' fees.

a. The history and purpose of Fed. R. Civ. P. 58 indicate that an attorneys' fee award, where authorized under applicable law, should be regarded as an item of costs, and therefore separate from the judgment on the merits. At the time the "cost" provision was added to Rule 58, the drafters were aware that the definition of "costs" would, in many cases, encompass attorneys' fees.

Marek v. Chesney. The principle embodied in Rule 58, that entry of judgments should not be delayed for the taxing of costs, is particularly important in the case of a request for fees, which necessarily must await the decision on the merits and which can require lengthy post-judgment proceedings.

b. This Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982) confirms that attorneys' fee awards, by their very nature, are collateral to the judgment on the merits. Since a request for fees does not constitute a Rule 59 motion to amend, the pendency of such a request cannot stay the time period for appeal under Fed. R. App. P. 4(a)(4). On the contrary, the time for appeal runs from the date of entry of the judgment on the merits or denial of the motions referred to in Fed. R. App. P. 4(a)(4). Consistent application of this rule in both federal question and diversity cases will promote finality, fairness and judicial economy.

c. A majority of the courts of appeals have followed the logic of *White* and adopted a bright-line rule to the effect that attorneys' fee awards are always collateral to the judgment on the merits and, thus, do not toll the period for appealing from the judgment. A minority of courts have adopted an *ad hoc* or situational approach, deciding in each case whether the particular fee request is collateral or integral to the judgment based on the application of several criteria. This approach produces uncertainty and increases the risk that litigants will unwittingly forfeit their right of appeal. It should not be adopted.

3. Under either the bright-line rule or the *ad hoc* approach, the fee award in this case plainly was collateral to the judgment on the merits. The Colorado statute involved here directs that the fees be awarded to the winning party "as part of the costs of the action." C.R.S. § 8-4-114. Petitioner did not request attorneys' fees in his complaint, did not present his request at trial, and first raised the issue in his bill of costs. Even under the *ad hoc* approach, these circumstances lead to the conclusion that the award of fees to petitioner was collateral.

4. If the timeliness of petitioner's appeal were measured according to state law, and not as a matter of federal procedure, there is still no basis to conclude that the fee award was integral to the judgment. As noted, the statute itself defines the fees as an item of "costs." No Colorado case holds otherwise. Moreover, petitioner's characterization of the fee award as integral to the judgment arose only after his appeal was deemed untimely and is inconsistent with his prior position.

5. There is no merit to petitioner's argument that the treatment of fee awards as collateral to the judgment should be given prospective application. Under *Firestone Tire and Rubber Company v. Risjord*, 449 U.S. 368 (1981), a jurisdictional ruling should not be made prospective only. Moreover, the conditions that must exist for prospective application of a ruling are completely absent from this case. The Tenth Circuit's decision in *Cox v. Flood*, 683 F. 2d 330 (10th Cir. 1982), is a clear and unequivocal statement of the rule which predated the entry of final judgment in this matter by almost two years. That decision clearly foreshadowed the result in this case. Peti-

tioner cannot have relied upon any federal or state decision in failing to file a timely notice of appeal, and no unfairness results to petitioner from application of the rule in *Cox* to his case.

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ARGUMENT

I. THE TIMELINESS OF PETITIONER'S APPEAL IS GOVERNED BY FEDERAL LAW.

The court of appeals correctly dismissed petitioner's appeal on the ground that petitioner failed to meet the thirty-day filing deadline prescribed by Rule 4 of the Federal Rules of Appellate Procedure. (Petition, p. 19) The proper application of Rule 4 is a matter of procedure that unquestionably is controlled by federal law.

Petitioner's invocation of the *Erie* doctrine confuses substantive rights with the process by which those rights are enforced. Petitioner's entitlement to an award of attorneys' fees is a substantive right created by state law, in this case the Colorado Wage Claim Act. No one here questions petitioner's substantive right to attorneys' fees under the Colorado statute,[2] and, indeed, the Court of Appeals expressly affirmed the district court's award of attorneys' fees. But to suggest that Colorado law likewise governs the timeliness of petitioner's notice of appeal is

[2]*See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259, n.31 (1975).

to deny any distinction between substantive rights and procedural rules.

As demonstrated below, the drafters of the federal rules of procedure recognized the need to establish uniform federal rules with respect to the finality of judgments and the timeliness of appeals. These rules were designed to displace conflicting state law and to ensure consistent practice and procedure in the federal courts, in federal question and diversity actions alike.

Even if the issue raised by petitioner were not covered by the federal rules, its proper resolution remains a matter of federal procedure. Applying a consistent federal procedure to the treatment of attorneys' fees in diversity actions will not influence a plaintiff's choice of forum, nor will failure to apply state procedure discriminate against citizens of the forum state. Thus, application of federal law in this case does not run afoul of *Erie*.

A. The Federal Rules of Procedure Control the Timing and Manner of Federal Appeals.

Petitioner contends that, under Colorado law, a judgment is not final and appealable until determination of the amount of an attorneys' fee award. As discussed below, respondent does not accept this characterization of the Colorado law. Nevertheless, even if petitioner were right, the Colorado rule would have no application in a federal diversity action, because the federal rules of procedure govern the timing and manner of all appeals to the United States courts of appeals. Fed.R.Civ.P. 1; Fed.R.App.P. 1.

The right of appeal itself derives from a federal statute, 28 U.S.C. § 1291. That statute confers upon the courts

of appeals jurisdiction of appeals "from all final decisions of the district courts of the United States. . . ." The timing of such appeals is prescribed in the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure. Under Fed.R.App.P. 4(a)(1), a notice of appeal must be filed "within 30 days after the date of entry of the judgment or order appealed from. . . ." Entry of a judgment is defined in Fed.R.App.P. 4(a)(6) by reference to Fed.R.Civ.P. 58 and 79(a). These rules require that every judgment be set forth on a separate paper and that the clerk formally enter the judgment on the docket, showing the substance of the judgment and the date of its entry.

The federal rules also address the relationship between the entry of judgment and an order for costs. Rule 54(d) describes the allowance of costs generally, and Rule 58 states that "[e]ntry of the judgment shall not be delayed for the taxing of costs." The purposes underlying this latter provision demonstrate the intent of the drafters of the federal rules to occupy the field and displace any other district court or state court rules dealing with the finality and appealability of judgments.

The provision with respect to costs did not appear in the original version of Rule 58, and was added by amendment in 1946 to ensure the application of a uniform federal rule. The Advisory Committee Report indicates that the amendment was aimed at conflicting district court and state court rules regarding the taxation of costs. Citing *United States v. Nordbye*, 75 F.2d 744 (8th Cir. 1935), *cert. denied* 296 U.S. 572 (1935), the Advisory Committee emphasized that Rule 58 would apply "even though state law is to the contrary." Advisory Committee Report on the

Federal Rules of Civil Procedure, 5 F.R.D. 433, 475-76 (1946). In *Nordbye*, the petitioner had argued that under Minnesota state law, the time for appeal did not commence to run until an award of costs was inserted in the judgment. The Court of Appeals rejected the argument, stating that

> the finality of a judgment for purposes of appeal in federal courts is not controlled by the procedure in the state courts, but is governed by the statutes of the United States and the procedure, rules and decisions of the national courts.

Id. at 746.

The *Nordbye* court did not indicate whether the "costs" awarded in that case encompassed an award of attorneys' fees, and this Court has not yet decided whether post-judgment fee requests constitute motions for "costs" under Rules 54(d) and 58. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 455, n.17 (1982). As demonstrated in Part II below, the drafters of the federal rules clearly recognized that the definition of "costs" under a variety of statutes included awards of attorneys' fees, and thus there is good ground to infer that the reference to "costs" in Rule 58 was meant to encompass attorneys' fee awards as well as any other awards of litigation costs. But putting aside that specific question, there can be no doubt that the finality of a judgment and the timeliness of a notice of appeal are matters that the rulemakers intended would be controlled by the federal rules of procedure.

Petitioner's argument that there is no federal rule directly requiring that "attorneys' fees be treated as a

collateral issue" (Petitioner's Brief, p. 11) misses the point of this Court's recent decision in *Burlington Northern R. Co. v. Woods*, 107 S.Ct. 967 (1987). The Court there recognized that in some cases the federal rules "implicitly" control the issue, and therefore must be read to displace the relevant state rule. In *Burlington Northern*, an Alabama statute imposed a mandatory 10% affirmance penalty. The statute did not, by its terms, directly conflict with Fed.R.App.P. 38. Nevertheless, this Court held that the purposes underlying Rule 38 "are sufficiently co-extensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions." 107 S.Ct. at 971.

In the present case, the federal rules address the finality of judgments and regulate the timing of appeals. Issues arising with respect to the timeliness of an appeal involve the interpretation and application of the federal rules. There is no room for the operation of a different set of state rules regarding the timeliness of appeals. *Burlington Northern*, 107 S.Ct. at 969; *see Hanna v. Plumer*, 380 U.S. 460, 471-73 (1965).

Finally, there can be no argument that application of the federal rules in this case would transgress constitutional or statutory constraints on this Court's rulemaking authority. Rules regulating the timing of appeals fall into the category of rules that are "indisputably procedural and *a priori* constitutional." *Burlington Northern*, 107 S.Ct. at 970. Similarly, such rules do not "abridge, enlarge or modify any substantive right" within the meaning of the Rules Enabling Act, 28 U.S.C. § 2072. Even if

such rules "incidentally affect litigants' substantive rights," they are exactly the sort of housekeeping rules that are necessary to maintain the integrity of the federal judicial system. *Burlington Northern*, 107 S.Ct. at 970; *see Hanna v. Plumer*, 380 U.S. at 464-65, 473; *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-446 (1946). In short, applying the federal rules to determine the timeliness of petitioner's appeal "affects only the process of enforcing [petitioner's] rights and not the rights themselves." *Burlington Northern*, 107 S.Ct. at 971; *see* Ely, The Irrepressible Myth of Erie, 87 *Harv.L.Rev.* 693, 722 (1974).

B. Even in the Absence of Controlling Federal Rules, the Timeliness of Petitioner's Appeal Is Properly Determined as a Matter of Federal Procedure.

If the Court were to conclude that the federal rules neither explicitly nor implicitly control the relationship between attorneys' fee awards and the finality of a judgment, it does not follow that state law must govern. Indeed, the policies behind this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) lead to exactly the opposite conclusion.

In the absence of federal rules covering the matter, the issue would shift from a Rules Enabling Act analysis to application of the more general principle that federal courts in diversity actions should apply state substantive law and federal procedural law. *Hanna*, 380 U.S. at 465-69; *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-52 (1980). Petitioner has not offered any rationale for concluding that the timeliness of his appeal should be viewed as anything other than federal procedural law.

This Court has emphasized that the choice between applying a state rule or a federal rule in a diversity action must be made with reference to the "twin aims" of *Erie*: "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna,* 380 U.S. at 468; *Walker,* 446 U.S. at 746. Neither of these objectives requires the application of state law to determine the timeliness of petitioner's appeal.

It could not reasonably be claimed that applying a federal rule with respect to the treatment of attorneys' fee awards in diversity actions will encourage forum shopping. As long as a litigant knows what the correct procedure is in both the state forum and the federal forum, the opportunity to prosecute an appeal will be the same in either court.

The fact that application of a federal rule in this case, at this point in the litigation, may be "outcome determinative" with regard to petitioner's appeal does not mean that the federal rule is outcome determinative in the *Erie* sense. As this Court noted in *Hanna*, the risk of forum shopping must be measured as of the outset of the litigation; otherwise *every* procedural variation—even differing time limits for the filing of pleadings—could be viewed as outcome determinative. Rejecting that approach, the Court stressed that a plaintiff who finds himself in federal court in a diversity action "cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts." *Hanna,* 380 U.S. at 468-69.

The same logic dictates the result in this case. The case having been removed to federal court, petitioner can-

not expect to file his notice of appeal in accord with the time limits applicable to appeals within the state court system. As in *Hanna*, "though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of forum." *Id.* at 469. Moreover, because the application of a federal rule does not deprive residents of the forum state of the opportunity to appeal from an adverse judgment, the equal protection concerns raised in *Erie* have no bearing in this case.

Practical considerations underscore the appropriateness of a uniform federal rule with respect to the finality of judgments and the timeliness of appeals in diversity actions. Application of a consistent rule throughout the federal judicial system ensures predictability, and protects litigants from the uncertainties inherent in attempting to apply a hodgepodge of inconsistent and potentially ambiguous state rules. In this case, for example, the parties do not agree on what the Colorado rule is. The statute itself states that attorneys' fees are "to be taxed as part of the costs of the action," C.R.S. § 8-4-114, yet petitioner relies on state court decisions involving other statutes to argue exactly the opposite. Given the potential forfeiture resulting from a failure to follow the correct procedure, litigants are entitled to expect the application of a clearly defined and uniform rule.

Applying state court procedure to the treatment of attorneys' fees would produce even greater confusion in cases that combine federal and state causes of action. For example, a plaintiff in federal court might assert, in sepa-

rate counts, violation of both federal and state antitrust laws. Both federal and state law may specify a statutory right to attorneys' fees. If federal procedure treats attorneys' fees as costs, and the forum state's procedure treats attorneys' fees as an integral part of the judgment, a losing defendant may be faced with two different timetables for appeal, depending on whether the jury's verdict appears to be based on the federal claim or the state claim.[3] There is nothing in *Erie* to suggest that the federal courts must tolerate such a procedural nightmare.

Finally, there is no identifiable state interest in dictating how federal courts determine the timeliness of appeals. Issues relating to the finality of judgments and the deadlines for filing notices of appeal are matters of judicial administration and convenience. The resolution of these issues in the federal court should rest entirely on the application of federal law.

II. UNDER FEDERAL LAW, A MOTION FOR ATTORNEYS' FEES DOES NOT STAY THE TIME FOR APPEALING A FINAL JUDGMENT.

As a matter of federal procedure, petitioner's motion for attorneys' fees did not stay the time period specified in Fed.R.App.P. 4(a) for filing a notice of appeal. First,

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[3]*See, e.g., Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194, 1202 (5th Cir. 1986) (defendant sought attorneys' fee award pursuant to contract and based on 28 U.S.C. § 2202; in determining timeliness of appeal, court of appeals applied state law to decide that award of fees pursuant to contract was an integral part of the judgment, and applied federal law to decide that award of fees pursuant to 28 U.S.C. § 2202 was collateral to the judgment).

Fed.R.Civ.P. 58 directs that entry of final judgment on the merits not be delayed for determination of the costs incurred by the prevailing party. The history of Rule 58 strongly suggests that this policy applies to allowable attorneys' fees just as it does to other expenses of litigation permitted under applicable law. Second, and in any event, this Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), confirms that attorneys' fee awards are collateral to the decision on the merits. It follows logically that the time period for appealing a judgment on the merits should not be stayed pending consideration of a request for attorneys' fees.

A. The History and Purpose of the Federal Rules Demonstrate That an Award of Attorneys' Fees Should Be Treated as an Item of Costs.

Rule 58 of the Federal Rules of Civil Procedure expresses a clear federal policy that final judgment should be entered promptly after a decision on the merits, without awaiting the award of costs to the prevailing party. Advisory Committee Report, 5 F.R.D. 433, 475 (1946); *see* Wright & Miller, *Federal Practice and Procedure* § 2785 at 18 (1973).

This policy has several important implications. For a prevailing plaintiff, entry of the judgment makes possible the issuance of a writ of execution, Fed.R.Civ.P. 69, and starts the clock running on post-judgment interest, 28 U.S.C. § 1961. For the losing party, whether plaintiff or defendant, entry of the judgment triggers the right of appeal. Because the federal rules do not specify any time limit on taxation of costs, the mandate in Rule 58 assures

that enforcement of decisions on the merits will not be delayed by disputes over the proper measure of costs.

Rule 58 also reflects a practical distinction between a judgment on the merits and an award of costs. Of necessity, costs cannot be determined until a final decision on the merits, since only then can the "prevailing party" be identified. Fed.R.Civ.P. 54(d); *cf. White,* 455 U.S. at 451-52. Further, since costs may accrue at any stage of the litigation, any calculation attempted prior to the entry of final judgment is bound to be incomplete. In effect, Rule 58 recognizes that the determination of costs is an entirely separate legal action from an adjudication on the merits. *See Maryland Cas. Co. v. Jacobsen,* 37 F.R.D. 427, 430 (W.D. Mo. 1965); *cf. White,* 455 U.S. at 452.

In *White,* this Court found it unnecessary to reach the question whether the reference to "costs" in Rule 58 was meant to encompass awards of attorneys' fees. The history of the federal rules, and the policy reflected in Rule 58, suggest that Rule 58 should be so construed, ensuring that the entry of a final judgment will not be delayed by consideration of an attorneys' fee request.

When Rule 58 was amended in 1946 to include the reference to costs, the authors of the amendment were aware of a variety of "statutes as to costs" authorizing the award of attorneys' fees as part of the costs in particular cases. Advisory Committee's Note to Rule 54(d), 28 U.S.C. App., p. 621; *Marek v. Chesny,* 473 U.S. 1, 8 (1985). Thus, in directing that the entry of judgment not be delayed for the taxing of "costs," the drafters recog-

nized that the definition of taxable costs would vary from case to case; the principle embodied in the amendment obviously does not turn on the specific items of costs allowable in a given case. In short, it is reasonable to infer that the term "costs" in Rule 58 was meant to encompass all costs, including attorneys' fees, that might be awarded under the applicable statute, rule or other authority. *See Marek v. Chesny,* 473 U.S. at 9.

The practical considerations that underlie Rule 58 apply with particular force to attorneys' fee awards. Typically, a fee award must await the determination of a "prevailing party." Since attorneys' fees are continuously accruing in the course of the litigation, the amount of the award cannot be fixed until the final judgment has been entered. In addition, the inquiry involved in determining a reasonable fee is such that further proceedings and lengthy delay are common. This process often requires the submission of detailed hourly time reports dating back to the beginning of the case, and frequently results in extensive briefing and argument. Delaying the entry of judgment until the conclusion of this process would defeat the very objectives embodied in the 1946 amendment to Rule 58.

In applying Rule 58, it should make no difference whether the attorneys' fee award is predicated on a federal statute, a state statute, or some other authority. In this case, petitioner's motion for attorneys' fees was predicated on a Colorado statute that specifically directs the award of "a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of this action." C.R.S. § 8-4-114. The timing and character of the court's

inquiry under this statute is no different than that required by federal statutes authorizing the award of attorneys' fees. *See White*, 455 U.S. at 451-452; *Marek*, 473 U.S. at 9. What matters is that the determination of a reasonable attorneys' fee is separate from, and necessarily must await, the decision on the merits. *See Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 293 (7th Cir. 1985).

In this case, the district court properly entered final judgment on March 26, 1984, without awaiting petitioner's filing of his bill of costs (in which, for the first time, he requested attorneys' fees). Under Fed.R.App.P. 4(a)(1) and (4), petitioner's thirty-day period for filing a notice of appeal commenced on May 14, 1984, when the court denied petitioner's motion to amend the judgment. By failing to file his notice of appeal until August 29, 1984, petitioner waived his right of appeal.

B. Under White v. New Hampshire Dept. of Employment Security, an Award of Attorneys' Fees Is Collateral to the Judgment on the Merits.

Whether or not attorneys' fees are properly viewed as "costs" under Rule 58, a fee award is clearly collateral to the judgment on the merits. Accordingly, as a matter of federal procedure, the judgment for petitioner was final and appealable prior to entry of the fee award.

This conclusion follows naturally from the Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982). In *White*, the Court considered a post-judgment request for attorneys' fees under

the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988. In holding that Fed.R.Civ.P. 59(e) does not apply to such requests, the Court stressed the collateral nature of the fee request, which requires "an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" 455 U.S. at 451-52. The same considerations apply to petitioner's fee request in this case.

Although the issue in *White* was limited to the applicability of Rule 59(e), the Court's reasoning anticipated the result in this case. The Court expressly noted, in support of its decision, several circuit court cases holding that a decision on the merits is final and appealable prior to the entry of a fee award. *Id.* at 452, n.14; *see e.g., Obin v. District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981).[4] The Court stated, "the collateral character of the fee issue establishes that an outstanding fee question does not bar

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[4]In *Obin*, the court of appeals decided that attorneys' fee requests do not constitute applications for costs under Rules 54(d) and 58. This conclusion did not lead the court to characterize fee awards as integral to the judgment on the merits. On the contrary, the court emphasized that fee awards differ from judgments on the merits, both in terms of the nature of the proceeding and the effect of the award. 651 F.2d at 580-581. On that basis, the court ruled:

> When a final judgment on the merits has been entered in an action in which a claim for attorneys' fees remains pending, the time for appeal on the merits runs from the entry of judgment. Subsequent consideration by the district court of the attorneys' fee claim does not toll the time for appealing the judgment on the merits.

Id. at 584.

recognition of a merits judgment as 'final' and 'appealable' ". 455 U.S. at 452, n.14 (citing *Obin*).

Logically, the holding in *White* forecloses any argument that a motion for attorneys' fees stays the thirty-day period for appeal from a judgment on the merits. Under Fed.R.App.P.4(a)(4), *only* if the request for fees were viewed as a Rule 59 motion would the time for appeal be extended. Since *White* holds that Rule 59 does not apply to post-judgment fee requests, the exception to Fed.R. App.P. 4(a)(1) is not available.

Nothing in the *White* opinion suggests that post-judgment motions for attorneys' fees based on authority other than the Civil Rights Attorneys' Fees Awards Act should be treated any differently. A rule that treats all attorneys' fee awards as collateral to the judgment on the merits is the only rule with respect to appellate review that promotes finality, judicial economy and fairness.

Since 1982, the principle adopted in *White* has been applied to a wide range of attorneys' fee requests. Following the rationale of *White*, the overwhelming majority of circuit courts have determined, without qualification, that a request for attorneys' fees is collateral to the merits and should be separately reviewed.[5]

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[5]For examples of the "bright-line" approach see: *Schultz v. Crowley*, 802 F.2d 498 (D.C. Cir. 1986); *Crossman v. Maccoccio*, 792 F.2d 1 (1st Cir. 1986); *Ellender v. Schweiker*, 781 F.2d 314 (2d Cir. 1986); *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1986); *Bernstein v. Menard*, 728 F.2d 252 (4th Cir. 1984); *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985); *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985); *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local Union 75 v. Madison Industries, Inc.*, 733 F.2d 656 (9th Cir. 1984); *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982).

A minority of circuits have deviated from the Court's reasoning in *White*. The *ad hoc* or situational approach adopted by those circuits requires an independent analysis of every attorneys' fee request to determine whether the request is collateral or integral based upon the wording of the statute or contract and other factors.[6] Even the leading proponent of the *ad hoc* approach, the Fifth Circuit, acknowledges the difficulties its case-by-case analysis creates for litigants. *See e.g., Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165, n.4 (5th Cir. 1984). If, in every instance, a litigant is forced to analyze whether his attorneys' fee request is integral or collateral, uncertainty rules. Unnecessary litigation will be engendered over the nature and application of state law, and its impact upon finality of the judgment.[7] In contrast, if the rule in *White* is applied consistently and attorneys' fee

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[6]See *Halderman v. Pennhurst State School and Hospital*, 673 F.2d 628 (3d Cir. 1982) *cert. denied* 465 U.S. 1038 (1984); *Beckwith Machinery Co. v. Traveler's Indemnity Co.*, 815 F.2d 286 (3d Cir. 1987); *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982), *cert. denied* 459 U.S. 1109 (1983); *Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); *Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc.*, 739 F.2d 534 (11th Cir. 1984).

[7]A careful review of those cases adopting the *ad hoc* approach demonstrates the uncertainty that a lawyer faces in attempting to define the intricacies of the relationship between attorneys' fees and damages. *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 294 (7th Cir. 1985), rejected the *ad hoc* approach as "too metaphysical" and held that resolution of the question of that relationship would depend on the legislative or bargaining history of a given statute or contract, a determination that most probably would *never* have a sensible answer. The *Exchange* court's analysis was adopted by the Tenth Circuit in its opinion in the instant case.

requests are deemed collateral to a judgment on the merits, litigants and their attorneys can approach post-judgment and appellate considerations with confidence, knowing that in diversity cases, while state law will determine the entitlement to fees, they may apply definitive, unambiguous rules of the federal courts to the timing of federal appeals.

Separation of a fee award from the merits judgment is the practical appproach. Designated as costs or otherwise, contractual or statutory, fee entitlements traditionally depend upon the court's determination of the prevailing party. Because of their dependent nature, attorneys' fees cannot be determined until litigation is complete and judgment has been entered. The standards for determining the reasonableness of fees require the trier of fact to review the litigation process from beginning to end. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In many instances, the prevailing party cannot be finally determined until the completion of appellate proceedings and, since the winning party is entitled to an award of fees for the appeal, the award cannot be quantified until the exhaustion of an appeal.[8] Judicial economy is not promoted by delaying an appeal of the merits pending a decision on attorneys' fees, only to find the attorneys' fee issue must be retried to reflect a reversal or other change in the decision on the merits. The need for finality, judicial economy and

[8]See e.g. *Keeton v. Rike*, 559 P.2d 262 (Colo. App. 1971) (under Colorado Wage Claim Act, C.R.S. § 8-4-114, the "winning party" may be entitled to fees for a successful appeal).

clarity can be best addressed by a rule under which all attorneys' fee requests are deemed collateral and are addressed and appealed separately from any determination on the merits. As was suggested in *White*, the district courts can adopt local rules which enable them either to reserve a decision on attorneys' fees until after an appellate decision or promptly to hear and determine claims for attorneys' fees, allowing the appellate courts to consider fee awards together with any appeal from a final judgment on the merits.[9]

III. THE ATTORNEYS' FEE AWARD IN THIS CASE IS COLLATERAL TO THE JUDGMENT UNDER ANY APPROACH ADOPTED BY THE FEDERAL COURTS.

Whether this Court follows the bright-line approach or the *ad hoc* approach, petitioner's motion for attorneys' fees is collateral to the judgment. As a result, petitioner's attorneys' fee motion would not, in any event, have stayed the thirty-day period for appeal from a judgment on the merits.

Petitioner may contend that, under the *ad hoc* approach, the time for appealing the merits should be stayed pending an attorneys' fee decision when state law views the attorneys' fee award as integral to the judgment. While the minority approach does look to the underlying state law as the source of entitlement to attorneys' fees, it does so only as a preliminary step to the application of federal criteria to determine whether the fee award is collateral or integral.

[9]See *White*, 455 U.S. at 454.

The factors utilized by the courts applying the *ad hoc* approach include whether such fees are contractual or statutory, whether they are denominated as costs or otherwise, whether their entitlement depends upon a party prevailing in the litigation, and whether the issue of fees was included in the relief requested in the complaint.[10] In applying these criteria, both the Fifth and the Eleventh Circuits have looked to state law in diversity actions as the source of the fee award, but have utilized federal law to determine whether the attorneys' fee award should be treated as "collateral" or as "costs" or as an "integral part of the merits." *See Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc.*, 739 F.2d 534, 535 (11th Cir. 1984) and *Oxford Production Credit Assoc. v. Duckworth*, 689 F.2d 587, 589 (5th Cir. 1982).

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[10]Attorneys' fee awards based on express contract provisions have been distinguished from statutory fee awards by the Second Circuit in *F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563 (2d Cir. 1985). The Fifth Circuit, in *Oxford Production Credit Assoc. v. Duckworth*, 689 F.2d 587 (5th Cir. 1982), determined that, under Mississippi law, awards of contractual attorneys' fees were treated as part of the damages. *See also Hooper v. FDIC*, 785 F.2d 1228 (5th Cir. 1986) and Bilmar Drilling, Inc. v. IFG Leasing Co., 795 F.2d 1194 (5th Cir. 1986).

In *Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984), the Fifth Circuit, following *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982), found that attorneys' fees denominated as "costs" were clearly collateral to the judgment. The Fifth Circuit viewed the fee request in *Alcorn County* as an integral item of the damages because the request for attorneys' fees was included in the complaint and was an integral issue in the trial, determined by the trier of fact at the time that the substantive issues were determined. In the instant case, attorneys' fees were first requested post-judgment, in petitioner's bill of costs, and formed no part of his pre-judgment requests for relief.

For example, in *Certain British Underwriters*, the Eleventh Circuit reviewed a Florida statute providing for attorneys' fees. That statute provided that compensation for attorneys' fees would be included in the judgment or decree rendered in the case. In contrast to the Colorado statute, attorneys' fees were not designated as costs. The Eleventh Circuit specifically recognized that other categories of attorneys' fees were collateral, including those where the applicable statute designates attorneys' fees as costs. 739 F.2d at 535.

The Colorado courts have never addressed the precise nature of the attorneys' fee authorized in C.R.S. § 8-4-114, the Colorado Wage Claim Act. Utilizing the criteria developed by those federal courts which have adopted the *ad hoc* approach, it is clear that a fee award under the Colorado Wage Claim Act is collateral even under that approach.

Under the Act, the entitlement to attorneys' fees is provided in an entirely separate statutory provision from that which sets forth the damages which may be awarded to the successful employee. *Compare* C.R.S. § 8-4-104 and § 8-4-114. The fee statute clearly does not contemplate attorneys' fees as damages. The award of fees is mandatory and applies to *either* plaintiff or defendant, whichever is successful. *Hartman v. Freedman*, 591 P.2d 1318 (Colo. 1979); *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App. 1975). The fees are described as "costs" and directed to be taxed as such. Nowhere can petitioner find support for his contention that attorneys' fees are part of his damages.

Further, in the instant action, the fee issue was never raised prior to submission of petitioner's bill of costs following entry of the judgment. The criteria which would support treating fees as integral to the merits judgment are not present here.

Regardless of whether the attorneys' fees entitlement embodied in C.R.S. § 8-4-114 is analyzed under the bright-line approach or the *ad hoc* approach, all circuit courts would find it collateral to the judgment on the merits. Accordingly, when petitioner failed to pursue his right to an appeal of the judgment on the merits in a timely fashion, that right was foreclosed.

IV. UNDER COLORADO LAW, AN AWARD OF ATTORNEYS' FEES PURSUANT TO THE COLORADO WAGE CLAIM ACT IS AN AWARD OF COSTS AND COLLATERAL TO THE JUDGMENT.

For the reasons discussed in Part I, the timeliness of petitioner's appeal must be determined as a matter of federal law. The court of appeals was not required to apply the timetable adopted by Colorado courts with regard to state appeals. However, even if this Court were to conclude that Colorado law must be applied, petitioner's appeal was still untimely.

As noted above, the Colorado Wage Claim Act provides that an award of fees is "to be taxed as part of the costs of the action." While the record indicates that petitioner has treated his attorneys' fee request as costs throughout the proceeding below, he now seeks to reformulate his request as an integral part of the merits.

He then argues that, under Colorado law, a judgment is not final while a request for attorneys' fees is pending. The cases cited by petitioner do not support his argument.

The Colorado courts have never addressed the nature of attorneys' fees under C.R.S. § 8-4-114. *Ball Corporation v. Loran,* 596 P.2d 412 (Colo. App. 1979) was a case which involved attorneys' fees sought as part of the damages in a Lanham Act case. That Act provides for attorneys' fees as part of the damages. *See* 15 U.S.C. § 117. The *Ball* court never addressed the questions presented herein. *Ball* simply cited *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976) in holding that, where liability had been determined but the issue of *damages* had been reserved by the court for future consideration, the court's ruling was not appealable under Colo.R.Civ.P. 54(b) because the order was interlocutory. That holding is not inconsistent with the approach respondent urges here.

In *Ortega v. The Board of County Commissioners of County of Costilla,* 657 P.2d 989 (Colo. App. 1982), attorneys' fees were sought under the provisions of C.R.S. § 13-17-101 *et seq.,* the Colorado statute penalizing frivolous and groundless litigation. Although the *Ortega* court's opinion does not contain any discussion of that statute, it provides that the court may award "as part of its judgment, and in addition to any costs otherwise assessed, reasonable attorneys' fees." Unlike the Colorado Wage Claim Act, there is no specific language directing that fees "be taxed as part of the costs." Under § 13-17-101 *et seq.,* fees are not available to a party merely be-

cause he prevailed, but require a showing that the whole or any part of the action was frivolous, groundless or without substantial justification. In its one paragraph opinion, the *Ortega* court did not touch upon the collateral nature of attorneys' fees. The court only decided that, while the appeal had been fully briefed on the issue of fees, the record did not contain a ruling on defendant's motion for attorneys' fees under C.R.S. § 13-17-101 and the case was not ripe for appeal. Again, nothing in that opinion is inconsistent with respondent's position.

In *Marietta v. Busto*, 691 P.2d 345 (Colo. App. 1984), *cert. denied* 105 S.Ct. 2024 (1985) the nature of the attorneys' fee request is not readily discernible from the opinion, but it is not an opinion interpreting C.R.S. § 8-4-114. The fee request appears to have been made under the Uniform Trade Secrets Act, which has a specific statutory provision, C.R.S. § 7-74-105, that does not define attorneys' fees as costs. The *Marietta* court held that the judgment was not yet final or appealable at a time when the trial court had specifically reserved the issue of recoverability of plaintiff's attorneys' fees but had not yet issued a ruling. The facts in *Marietta* are clearly distinguishable from those here, and the court's ruling does not foreclose a finding that fees denominated as costs are collateral.

Finally, petitioner cites *Torrez v. Day*, 725 P.2d 1184 (Colo. App. 1986). In *Torrez*, the Colorado Court of Appeals held that a post-trial motion for attorneys' fees under C.R.S. § 13-17-101 *et seq.*, the statute penalizing frivolous and groundless litigation, was a motion for alteration or amendment of judgments under Colo.R.Civ.P. 59, and, therefore, extended the time for filing an appeal of the action. As set forth above, C.R.S. § 13-17-101 *et seq.*, and the cases interpreting that statute, are distinguishable from this case.[11]

Petitioner's attempt to apply his current interpretation of Colorado law to the fee award represents a complete about face from his position in the proceedings below. In fact, petitioner consistently interpreted his attorneys' fee request as costs, and treated his fee request as collateral to the judgment on the merits.

Petitioner never mentioned attorneys' fees in the complaint, in the amended complaint, or in any pre-trial motions. The issue was not presented to the jury or the court preceding the entry of judgment on March 26, 1984. Petitioner first requested attorneys' fees in a post-judgment motion, which stated that petitioner was seeking

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[11]The Colorado Court of Appeals recently decided *Basset v. Eagle Telecommunications, Inc. of Colorado*, — P.2d — Case No. 86CA1046 (Colorado Court of Appeals, December 10, 1987). The case addresses the issue of interest on attorneys' fees awarded under C.R.S. § 8-4-114. The court was asked to determine whether attorneys' fees were part of the damages and, if so, whether prejudgment interest on these fees would run from the date of the verdict on damages. The Colorado court held that interest on attorneys' fees runs only from the date an award of fees is entered as a judgment. That opinion contains *dicta* that seems inconsistent and contradictory. The court first states that, because the amount awarded by the jury remains subject to revision until the award of attorneys' fees, no judgment on any amount would be considered to have been entered prior to the fee decision. In the following paragraph, however, the court correctly cites the wage claim statute as providing that the attorneys' fees were to be taxed as part of the costs of the action. The court clearly distinguishes attorneys' fees from the damages in the action. The *Basset* decision cannot be seen as controlling the issue of attorneys' fees as it relates to appellate jurisdiction.

fees as costs. *See* "Memorandum in Support of Attorneys' Fees *as Costs*," filed on April 6, 1984 (J.A., p. 41) (Emphasis added). Although petitioner filed a Rule 59 motion, he did not raise attorneys' fees in that motion and he did not characterize his fee request as altering or amending the judgment.

Petitioner's current characterization of his fees as integral to the judgment is inconsistent with his previous position and pleading in this matter. Petitioner's construction of Colorado law arises solely from his untimely appeal and is not well-founded.

V. APPLICATION OF THE TENTH CIRCUIT'S JURISDICTIONAL RULING TO THIS ACTION DOES NOT VIOLATE ANY RESTRICTIONS ON RETROACTIVITY.

Petitioner argues that the Tenth Circuit's decision is fundamentally unfair, and requests that any decision be given prospective application only. As the Tenth Circuit observed, petitioner's argument is entirely out of place.

Petitioner ignores the fact that the timing of an appeal is a jurisdictional matter. When a court lacks the discretion even to consider the case before it, its ruling may never be made prospective only. *Firestone Tire and Rubber Company v. Risjord,* 449 U.S. 368 at 379 (1981); *Exchange National Bank of Chicago v. Daniels,* 763 F.2d 286, 294 (7th Cir. 1985). In any event, petitioner has not demonstrated circumstances that would warrant limiting the Tenth Circuit's ruling in this case.

Petitioner cites *EEOC v. Gaddis,* 733 F.2d 1373 (10th Cir. 1984) in support of his prospectivity argument. *Gaddis* reiterates this Court's holding in *Chevron v. Huson,* 404 U.S. 97 (1971), outlining three considerations that bear upon the issue of non-retroactivity: (1) whether the holding in question decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases; 2) whether retroactive operation will further or retard the operation of the holding in question; and 3) whether retroactive application could produce substantial and equitable results in individual cases.[12] These standards, applied here, do not indicate that this case warrants an exception to the ordinary rule of retroactivity.

In *Gaddis,* judgment on the merits was entered in March, 1982, only three weeks after this Court's decision in *White.* Subsequent to the decision on the merits, the parties stipulated to entry of an attorneys' fee award. An appeal was then lodged from the entry of a June, 1982 judgment which included the stipulated attorneys' fees.

In July, 1982, the Tenth Circuit, in *Cox v. Flood,* overruled its previous decision in *Glass v. Pfeffer,* 657 F.2d 252 (10th Cir. 1981), and held that "judgments finally disposing of the merits are appealable even though

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[12]*Chevron v. Huson,* 404 U.S. 97, 104 (1971); *EEOC v. Gaddis,* 733 F.2d 1373, 1376 (10th Cir. 1984); *Trinity Broadcasting v. Eller,* — F.2d — No. 86 CA 2118 (10th Cir., December 9, 1987).

questions relating to attorneys' fees have been left undecided." 683 F.2d 330 at 331. In *Cox*, the Tenth Circuit specifically overruled all prior opinions inconsistent with that holding.

Applying the factors enumerated above, the *Gaddis* court declined to apply *Cox* retroactively, finding that Gaddis had acted consistently with the Tenth Circuit's prior holdings, including its decision in *Glass v. Pfeffer*. To do otherwise would have placed the court in the anomalous position of holding that Gaddis' appeal was barred because he did not file an appeal that would have been premature under the law that existed on March 25, 1982, the judgment date.

The court's reasoning in *Gaddis* does not apply here. At the time of the judgment herein, the rule adopted in *Cox* clearly controlled the timing of appeals in the Tenth Circuit. *Cox* was decided almost two years prior to the district court's decision in this case. The resolution of the issue in this case was clearly foreshadowed by *Cox*. Nothing in *Cox* indicated an exception to the rule that judgments are appealable even though questions relating to attorneys' fees, of whatever nature, are undecided. Nothing in *Cox* indicated any acceptance or consideration of an *ad hoc* approach in the Tenth Circuit. *Cox* specifically overruled any prior decisions in conflict with its holding. Petitioner cannot have relied upon federal precedent when he let his appeal period lapse.

Further, as demonstrated above, petitioner cannot realistically claim to have relied on his current interpreta-

tion of Colorado law in failing to appeal the judgment. Having treated attorneys' fees as an item of costs in the proceedings below, petitioner should have taken an appeal without waiting for a resolution of his fees request.

Petitioner's argument that he has a meritorious appeal is not only disputed, but is of no effect. As the record indicates, the merits of petitioner's case are suspect. However, that question is not relevant to a determination of whether application of *Cox* is unfair. The "merits and demerits" discussed in *Gaddis* refer to consideration of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation, and not to the "merits" of this petitioner's case. 733 F.2d 1373 at 1376.

Finally, there is no inequity to petitioner, because the dismissal of his appeal stems solely from his failure to follow the rule articulated by the Tenth Circuit in *Cox v. Flood*. Application of the *Cox* rule to a case decided two years thereafter is scarcely an injustice.

In conclusion, even if this Court could consider petitioner's request for prospective application, none of the criteria justifying prospective application apply here, and petitioner should not be exempted from the jurisdictional rule announced in *Cox*.

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CONCLUSION

For the reasons discussed above, the decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Colorado Revised Statutes, Title 8, Article 4, Section 114
Employee may recover attorney fee. Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

Colorado Revised Statutes, Title 8, Article 4, Section 104
Termination of employment—penalty. (3) If an employer refuses to pay wages or compensation in accordance with subsection (1) of this section upon request by the employee and without a good faith legal justification for such refusal, the employer is liable to the employee, in addition to the compensation legally proven to be due, as a penalty for such refusal the greater of an amount equal to fifty percent thereof or an amount equal to the amount of the wages payable per day to such employee not to exceed ten days. The wages payable per day shall be calculated at the same rate which the employee was receiving at the time of separation. The employee or his designated agent shall make a written demand for the payment within sixty days from the date of separation and shall state in the demand where such payment can be received. The daily wage penalty shall not be imposed until the employer receives such written demand. The employee or his designated agent may commence a civil action to recover such penalty. Any employee or his designated agent who has not made a written demand for the payment within sixty days from the date of separation or who has otherwise not been available to receive payment shall not be entitled to any such penalty under this subsection (3). A payment under this subsection (3) shall be made in the form of a check draft or voucher in the name of the employee.

Colorado Revised Statutes, Title 7, Article 74, Section 105
Attorney fees. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party.

Colorado Revised Statutes, Title 13, Article 17, Section 101
Legislative declaration. The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

Colorado Revised Statutes, Title 13, Article 17, Section 102
Attorney fees. (1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees. (2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature, commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification. (3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such

amount, or portion thereof, to any offending attorney or party. (4) The court shall assess attorney fees, if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious. (5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action. (6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any party thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article. (7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado. (8) The provisions of this section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving violations of municipal ordinances.